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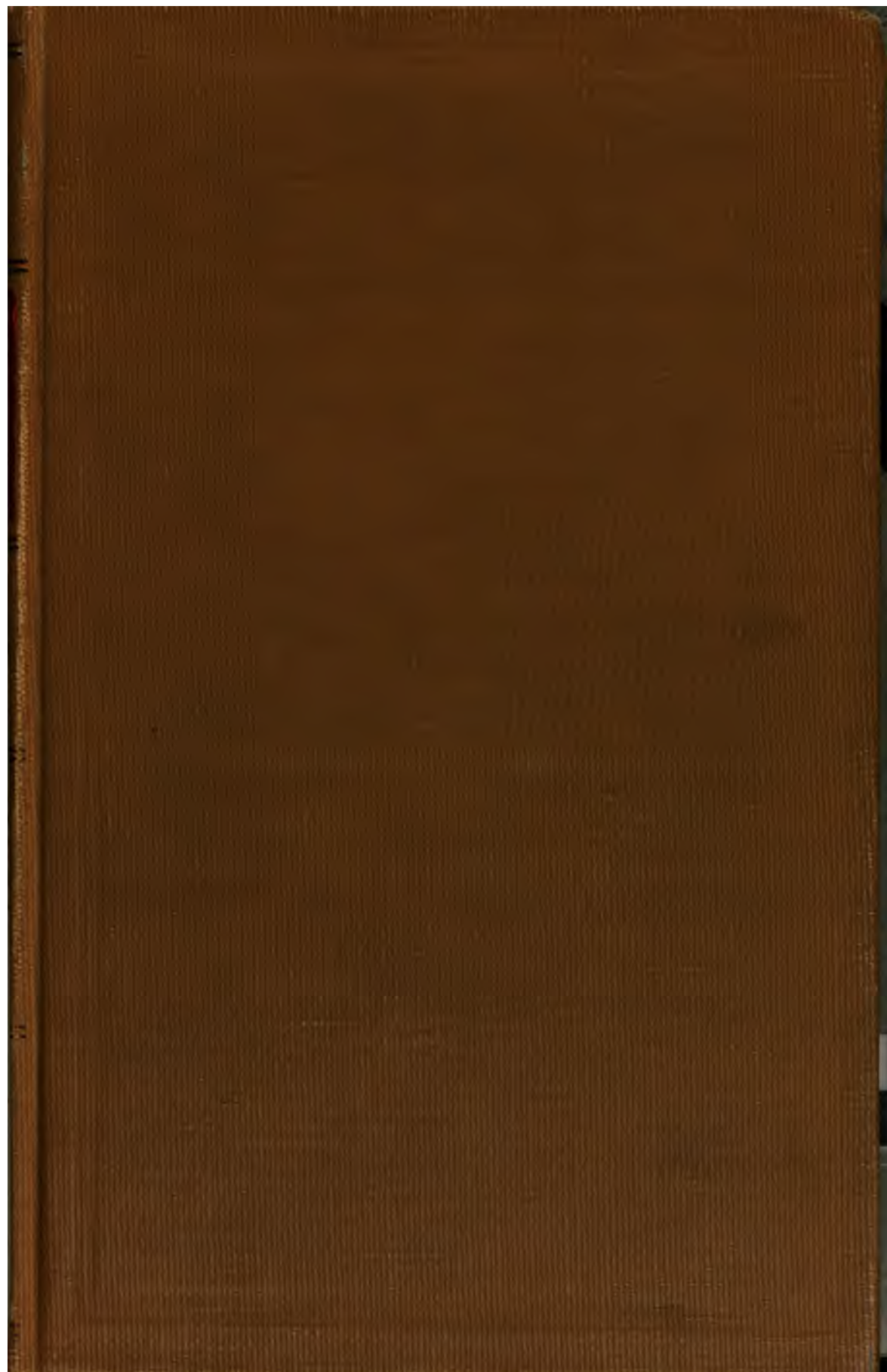
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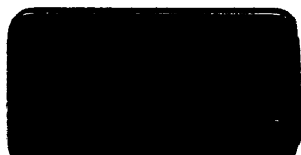
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OUTLINES

OF THE

LAW OF BAILMENTS AND CARRIERS

BY

EDWIN C. GODDARD

PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN

Revised Edition

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PREFACE

This work on Bailments and Carriers is primarily for students, but practitioners will find here in concise form the leading principles of the subject and citations to the important decisions. The aim of the outlines is to set forth in concise and orderly form the foundation principles of this branch of the law, in order to conserve the time of the student and to give him definite conceptions and clear relations in his study of the illustrative cases, in which the principles of the law find concrete application.

Accordingly, in the outlines will be found the briefest possible statement of elementary principles, a bird's-eye view of the whole subject. For the exemplification and amplification of these principles the student is expected to make a close study of the companion volume, "Selected Cases on the Law of Bailments and Carriers," in which the rules are justified by the reasoning of the ablest jurists. By a mastery of these cases may be acquired mental power, and that ability to apply abstract principles to concrete cases which is of prime importance in the equipment of every real lawyer.

The citation of cases in so brief a work is of course not exhaustive, but a large portion of the cases cited are reported in the valuable selections of cases, the American Decisions, American Reports and American State Reports, in which will be found exhaustive notes on practically every branch of the subject. Through those notes both the student and the practitioner using this book is put within easy reach of all the important decisions on each topic.

The quasi-bailment relations assumed by telegraph and tele-

phone companies, as well as by carriers of passengers, have been included, both because of their importance and of their close relation to other carriers. Their position in the law is anomalous, but the controlling principles are so similar to the rules of bailment law as to make this the most natural and desirable connection in which to study them.

EDWIN C. GODDARD.

Ann Arbor, July 1, 1904.

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| <p>§ 404. Classification.</p> <p style="padding-left: 20px;">A. <i>Actions against common carriers of goods.</i></p> <p style="padding-left: 40px;">1. <i>The parties to the action.</i></p> <p>405. The proper party plaintiff.</p> <p>406. Contract action.</p> <p>407. —Consignor agent of consignee.</p> <p>408. Tort action.</p> <p style="padding-left: 20px;">2. <i>The action.</i></p> <p>409. The form of the action.</p> <p>410. Action <i>ex delicto</i>.</p> <p>411. Action <i>ex contractu</i>.</p> <p>412. Modern procedure.</p> <p style="padding-left: 20px;">3. <i>The pleadings.</i></p> <p>413. Show case or assumpsit.</p> <p style="padding-left: 20px;">4. <i>The evidence.</i></p> <p>414. Burden of proof.</p> <p style="padding-left: 20px;">5. <i>The damages.</i></p> <p>415. For injury or loss.</p> <p>416. Proximate cause.</p> <p>417. The measure of damages.</p> <p>418. —Value how determined.</p> <p>419. For default in carrying.</p> <p>420. —Expected profits.</p> <p style="padding-left: 20px;">B. <i>Actions against carriers of passengers.</i></p> <p style="padding-left: 40px;">1. <i>The parties.</i></p> <p>421. The injured party.</p> <p style="padding-left: 20px;">2. <i>The form of the action.</i></p> <p>422. The choice of action.</p> | <p style="padding-left: 20px;">3. <i>The pleadings.</i></p> <p>§ 423. Special damages specially pleaded.</p> <p style="padding-left: 20px;">4. <i>The evidence.</i></p> <p>424. Burden of proof.</p> <p style="padding-left: 20px;">5. <i>The damages.</i></p> <p>425. Compensation for the injury.</p> <p>426. Damages for wrongful ejection.</p> <p>427. Damages for mental suffering and fright alone.</p> <p>428. Exemplary damages.</p> <p style="padding-left: 20px;">C. <i>Actions against carriers of intelligence.</i></p> <p style="padding-left: 40px;">a. <i>Carriers of mail.</i></p> <p>429. No action maintainable.</p> <p style="padding-left: 40px;">b. <i>Telegraph and telephone companies.</i></p> <p style="padding-left: 40px;">1. <i>Parties to the action.</i></p> <p style="padding-left: 40px;">2. <i>Form of action.</i></p> <p>430. Contract or tort action.</p> <p>431. An action on the contract.</p> <p>432. A tort action.</p> <p style="padding-left: 20px;">3. <i>The pleadings.</i></p> <p>433. Governed by general rules.</p> <p style="padding-left: 20px;">4. <i>The evidence.</i></p> <p>434. Burden of proof.</p> <p style="padding-left: 20px;">5. <i>The damages.</i></p> <p>435. Measure of damages.</p> <p>436. Duty to disclose importance of message.</p> <p>437. Damages for mental suffering and injury to feelings.</p> |
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PART I.

OF BAILMENTS IN GENERAL

CHAPTER I.

OF THE DEFINITION AND CLASSIFICATION OF BAILMENTS.

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| § 1. Bailment defined. | § 7. Transfer of possession, but |
| 2. A contractual relation. | not of title. |
| 3. Delivery. | 8. —Bailment and sale. |
| 4. —Illustrations. | 9. —Special rules. |
| 5. —Acceptance. | 10. Bailment purpose. |
| 6. The subject-matter. | 11. Redelivery, or delivery over. |
| | 12. Classification of bailments. |

§ 1. **Definition.**—Many attempts have been made to define a bailment but none is free from criticism. For our purpose it is enough to say that—

A *bailment* is a contract relation resulting from the delivery of personal chattels by the owner, called the bailor, to a second person, called the bailee, for a specific purpose, upon the accomplishment of which the chattels are to be dealt with according to the owner's direction.

An analysis of this statement will make clear the primary principles applicable to the subject.

§ 2. **Contractual relation.**—The bailment relation is one of contract and the principles of contract law are applicable

§ 1. *[2] Krause v. Commonwealth, 93 Pa. St. 418, 39 Am. R. 762; [1] Coggs v. Bernard, 2 Ld. Raymond, 909, 1 Smith Lead. Cas. 199. § 2. Costello v. Ten Eyck, 86 Mich. 348, 49 N. W. R. 152, 24 Am. St. R. 128.

*The cases with brackets before them are printed in *Select Cases on Bailments and Carriers*. The numbers in the brackets refer to the sections in the Case Book.

thereto. No one can be made a party to a bailment except by his contract freely made, or by some condition which by operation of law is regarded as equivalent to a contract.

§ 3. **Delivery.**—The word *bailment* comes into the English Common Law through the Norman-French. It is derived from *bailler*, to deliver, and *delivery* has been said to be the key word of bailment law.

A prime requisite to the establishment of the relation is a delivery by the bailor to the bailee, or something which by operation of law takes the place of such delivery. The bailment relation, then, may be formed by delivery, actual or constructive, or by operation of law.

§ 4. —**Illustrations.**—(a) *Actual delivery* is a manual handing over of the chattel by the bailor, or his authorized representative, to the bailee or to his agent. The delivery of a watch to a jeweler for repair, of a horse to a smith to be shod, and of a package to an expressman to be carried, are familiar illustrations.

(b) *Constructive delivery* takes place when because of the circumstances, or of the nature of the chattel, actual delivery is impossible or useless. The delivery of a key to a warehouse may be a constructive delivery of the goods therein, and the retention by the vendor of the goods sold constitutes him, so long as he retains possession, the bailee of such goods by constructive delivery, without any actual handling of the goods by either party.

(c) *Delivery by operation of law* results from the finding of lost goods, or the seizure of goods under legal process. The finder, or the officer is, by operation of law, not by consent of the owner, bailee of the goods while they remain in his possession.

§ 5. —**Acceptance.**—No delivery is complete till acceptance by the bailee. One cannot be compelled to become a bailee without his consent. Even the finder of lost goods does not become the bailee unless he voluntarily takes possession of the goods.

§ 4. King v. Jarman, 35 Ark. 190, [19] Foster v. Essex Bank, 17 Mass. 37 Am. R. 11, 16, and note. 479, 9 Am. D. 168; First National

§ 5. Michigan Central R. R. v. Bank v. Ocean National Bank, 60 Carrow, 73 Ill. 348, 24 Am. R. 248; N. Y. 278, 19 Am. R. 181.

§ 6. **The subject-matter.**—This delivery must be one of personal chattels. Real estate can not be the subject of a bailment.

Formerly only corporeal property could be bailed, but at the present time every species of personalty, corporeal or incorporeal, is bailable. Thus, stocks, bonds, and other evidences of property, as well as debts and every sort of chose in action, are now pledged, or otherwise held in bailment, under the same principles as tangible property. Indeed while the bailed property must be in existence, a contract of bailment as to property not yet in existence will attach to such property when it comes into existence, subject, perhaps, to the intervening rights of third persons.

§ 7. **Transfer of possession but not of title.**—In a bailment the owner delivers the chattel to the bailee who thereby acquires possession, but not title. The ownership remains in the bailor, and though the bailee may himself be the rightful owner, yet so long as he retains possession as bailee he may not dispute the bailor's title.

§ 8. —**Bailment and sale.**—The distinction between a bailment and a sale is clear. A sale passes the *title* to the vendee at once. He may acquire possession immediately, or only a right to possession at a future time. A bailment passes *possession* to the bailee at once. He does not acquire the title, nor, except in a bailment with an option to purchase, does he acquire any right to title in the future. In a sale title passes, in a bailment it does not.

In practice the distinction is often troublesome. Difficulty arises in finding a test by which to determine the intention of the parties, for it is their intention that governs.

Three cases may be noted—

(a) If the identical property is to be returned, either in specie or in altered form, the transaction is a bailment.

(b) If other goods of the same or of different kind are to be returned, the transaction is what was known in the Roman law as a *mutuum*, and is considered a sale and not a bailment.

§ 7. [2] *Krause v. Commonwealth*, 93 Pa. St. 418, 39 Am. R. 762; *Simpson v. Wrenn*, 50 Ill. 222, 99 Am. D. 511; [3] *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. R. 229.

433, 57 Am. D. 530; [4] *Bretz v. Diehl*, 117 Pa. St. 589, 11 Atl. R. 893, 2 Am. St. R. 706. See also *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. D. 623; *Ledyard v. Hibbard*, 48 Mich. 421, 12 N. W. R.

§ 8. *Foster v. Pettibone*, 7 N. Y. 637, 42 Am. R. 474.

(c) If the goods are mixed with other goods, as grain in an elevator, then the doctrine of confusion of goods applies, and the owners of the grain so mixed become owners in common of the mass, or else the transaction is a sale and title to the whole passes to the elevator owner.

It is often difficult to determine whether the parties intended title to pass. The cases on this point are irreconcilable. The most useful test lies in determining with which party the contract leaves that control of the goods which is consistent with ownership. If the elevator owner may use out of the grain at will under an agreement to return a like amount, or to pay the market price, when demand is made, he has control, is the owner, the transaction was a sale. If, however, the depositor of the grain may at any time demand his proportion of the mass of grain, or the market price, the elevator owner undertaking at all times to keep on hand enough grain to cover all deposits, then it is clear that the control remains in the depositor, the title did not pass the transaction was a bailment.

The importance in many cases of determining whether the transaction was a bailment or a sale will be apparent from the cases.

§ 9. —**Special rules.**—In some states, on the ground that a bailment best represents the relation intended by the parties, the courts have been inclined to hold all such deposits in an elevator to be bailments. They are sometimes made bailments by statute.

§ 10. **Bailment purpose.**—The *specific purpose* for which the chattel is delivered to the bailee is called the *bailment purpose*. This purpose must of course be a legal one and, as will presently appear, it serves as the most satisfactory basis of classification of bailments, and leads to most of the legal consequences of the relation.

§ 11. **Redelivery, or delivery over.**—Upon the accomplishment of the bailment purpose, the chattel is to be *dealt with*

§ 9. See 2 Am. St. R. 711, note, Jones, Story and Kent as stated in 6 Am. Law Review, 450; Hall v. [2] Krause v. Commonwealth, 93 Pillsbury, 43 Minn. 33, 44 N. W. Pa. St. 418, 39 Am. R. 762; R. 673, 9 Am. St. R. 209. [3] Pulliam v. Burlingame, 81 Mo.

§ 11. Compare the definitions of 111, 51 Am. R. 229.

according to the owner's directions. In many cases it is to be redelivered to the owner. In the case of delivery of goods to a carrier, or consignment to a factor, they are to be delivered to a third person, while in the case of a bailment with an option to purchase they may be retained by the bailee himself.

In general the bailor is the true owner and the bailee must deal with the goods according to his directions. If he delivers them otherwise, he does so at his peril, and unless he can establish that they were delivered to one having paramount right, he will be liable to the bailor.

§ 12. **Classification.**—Until very recent times the Common Law of bailments was in a crude and formative condition. As bailment law in Rome was well defined, early English legal writers on the subject were greatly influenced by the Civil Law and adopted the Roman division, which was a mere catalogue rather than a scientific classification.

See Bracton (circ. 1260), Lord Holt (1703), Sir William Jones (1781).

Judge Story, in his classic work on the subject, first suggested a scientific classification based on the bailment purpose. He divided bailments into three classes—

(a) Bailments for the sole benefit of the bailor, including the Roman *depositum* and *mandatum*.

(b) Bailments for the sole benefit of the bailee, including the Roman *commodatum*.

(c) Bailments for the mutual benefit of both parties, including the Roman *pignus*, or pledge, and *locatio*, or hiring.

The Civil Law recognized also the *mutuum*, or the loan of goods for consumption, to be replaced by other goods of the same kind. It has been seen that, at the Common Law, this is not a bailment but a sale. ✓

There is not an exact correspondence between the Roman and the Common Law bailments and this has sometimes led to confusion. The Roman *depositum* and *mandatum*, especially, involved distinctions and embraced relations not recognized in the Common Law. Definitions of these various kinds of bailments will be given in connection with their separate treatment.

§ 12. See Schouler, Bailments and v. Commonwealth, 93 Pa. St. 418, Carriers, § 26, notes; [2] Krause 39 Am. R. 762.

OF BAILMENTS IN GENERAL.

Bailments	gratuitous	gratuitous services	{	<i>depositum</i>	
		gratuitous loans		<i>mandatum</i>	
	mutual benefit	{	<i>pignus</i> , or pledge	{	<i>commodatum</i>
					<i>locatio</i> , or hiring
<i>locatio operis</i> , hired services about a thing	{	extraordinary entered into by	{	<i>locatio custodiarum</i>	
					<i>locatio operis mercium vehendarum</i>
					innkeepers
					common carriers of goods

Quasi-ballment relations of { carriers of passengers
the post-office department
telegraph and telephone companies

CHAPTER II.

OF THE LEGAL RESULTS OF THE RELATION IN GENERAL.

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| <p>§ 13. Contract principles apply.</p> <p>14. Principles applicable to all bailments.</p> <p>15. Care.</p> <p>16. —Three degrees of diligence.</p> <p>17. —The burden of proof.</p> <p>18. Consideration.</p> <p>19. Expenses.</p> <p>20. Defect in bailed chattel.</p> <p>21. Right to use.</p> <p>22. Property of bailee.</p> <p>23. Liability to third persons.</p> <p>24. Termination of bailment.</p> <p style="padding-left: 20px;">A. <i>By act of the parties.</i></p> <p style="padding-left: 40px;">1. <i>Accomplishment of purpose, or efflux of time.</i></p> <p>25. Bailment contract executed.</p> <p style="padding-left: 20px;">2. <i>Rescission of bailment contract.</i></p> | <p>§ 26. (1) By act of both parties.</p> <p>27. (2) By act of bailee.</p> <p>28. (3) By act of bailor.</p> <p>29. —Bailee's wrong.</p> <p style="padding-left: 20px;">B. <i>By operation of law.</i></p> <p>30. 1. By changed status of the parties.</p> <p>31. —Death.</p> <p>32. —Bankruptcy, marriage, insanity.</p> <p>33. 2. Change of status of bailed chattel.</p> <p>34. Redelivery.</p> <p>35. —What is to be redelivered.</p> <p>36. —Where returned.</p> <p>37. —To whom redelivered.</p> <p>38. —Adverse claims.</p> <p>39. Special contract.</p> |
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§ 13. Contract principles apply.—The law of bailments is a branch of the law of commercial contracts. Accordingly, all the requisites of contracts, such as competent parties, mutual assent, consideration, etc., apply to all classes of bailments.

As any bailee may, and the great carrying corporations, such as railways, steamship lines, express and forwarding companies, constantly do, act by agent, the principles of agency are always applicable. Without detailed notice, therefore, of the rules of contracts and agency, it will be understood that they apply to every class of bailments. Furthermore, partnerships or corporations, as bailors or bailees, are subject to the same rules of law that apply to them in other contract relations.

§ 14. **Principles applicable to all bailments.**—It will avoid needless repetition to discuss in the present chapter those principles which are applicable to bailments generally, leaving for consideration in later chapters those legal results peculiar to the several classes of bailments.

§ 15. **Care.**—A matter of prime importance in bailments is the care of the bailed goods to be exercised by the bailee. This does not admit of precise definition. Whether due care has been exercised in a given case is ordinarily a question of fact to be determined by the common sense of a jury in view of all the circumstances surrounding the case.

Manifestly, the care to be exacted should vary with the nature and value of the thing bailed, the use to which it is to be put, the hazard of the bailment, and many other circumstances. Great stress is laid by the law on the benefit to be derived from the bailment. The greatest diligence is, in general, demanded of the bailee if he receives the sole benefit of the bailment; less diligence is required if the bailment is mutually beneficial to bailor and bailee; while comparatively slight diligence suffices if the bailor alone profits by the bailment.

§ 16. —**Three degrees of diligence.**—In the effort to reach some degree of certainty in this necessarily uncertain question, the courts, from Lord Holt's time down, have recognized three degrees of care, which have been variously defined. Unfortunately, they have also recognized three degrees of negligence, and by implication, at least, have held that there might be negligence with no resulting legal liability.

The three degrees of diligence are slight, ordinary and great. To these correspond gross, ordinary and slight negli-

§ 15. [5] *Doorman v. Jenkins*, Essex Bank, 17 Mass. 479; 9 Am. D. 2 Ad. & El. 256, 29 E. C. L. 80; 168; [6] *Gray v. Merriam*, 148 Ill. 179; 39 Am. St. R. 172; [8] *Wilson v. Brett*, 11 Mees. and W. 113; [7] *Preston v. Prather*, 137 U. S. 604; *State v. Meagher*, 44 Mo. 356, 100 Am. D. 298. [7] *Preston v. Prather*, 137 U. S. 604; *First National Bank v. Graham*, 79 Pa. St. 106, 21 Am.

§ 16. [135] *Steamboat New World v. King*, 16 How. (U. S.) 469; [103] *Bailway v. Lockwood*, 17 Wall. (U. S.) 357; [19] *Foster v.* R. 49; *Woodruff v. Painter*, 150 Pa. St. 91, 24 Atl. R. 621, 30 Am. St. R. 786.

gence, each degree of negligence being regarded as the want of the corresponding degree of care.

From the many definitions attempted, it is perhaps enough to say that—

Ordinary diligence is such as an ordinarily prudent man is wont to exercise in the conduct of his own affairs of like kind. Less than this is *slight diligence*, more is *great diligence*.

It will be seen that this adds little to the definiteness of the subject, and some courts have expressed dissatisfaction with the distinctions, preferring to determine in each case whether, in view of all the circumstances, the requisite care has been exercised. Courts recognizing the three degrees hold that—

In bailments for the sole benefit of the bailor slight care is all that is required of the bailee, and he is liable only for gross negligence.

In bailments for the sole benefit of the bailee great care is required, and the bailee is responsible for slight negligence.

In mutual benefit bailments ordinary care is required, and the bailee must answer for ordinary neglect.

In a later chapter it will appear that the innkeeper and common carrier are subject to special rules.

§ 17. —The burden of proof in showing negligence, at the outset, rests upon the plaintiff. Some authorities say that while the weight of evidence may shift, the burden of proof never shifts, but remains throughout with the plaintiff. Others say that the burden shifts. The plaintiff certainly must establish negligence by a preponderance of evidence.

According to most cases, the plaintiff makes out a *prima facie* case by showing loss or injury. The defendant must then explain the loss or else show affirmatively that he exercised due care.

§ 17. Compare [9] *Claffin v. Meyer*, 75 N. Y. 260, 31 Am. R. 467, and *Higman v. Camody*, 112 Ala. 267, 20 So. R. 480, 57 Am. St. R. 33. See also *Boies v. Hartford, etc., R. R.*, 37 Conn. 272; 9 Am. R. 347; *Cumins v. Woods*, 44 Ill. 416, 92 Am. D. 189; *Mills v. Gilbreth*, 47 Me. 320; 74 Am. D. 487; [43] *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. D. 143; *Hildebrand v. Carroll*, 106 Wis. 324, 82 N. W. R. 145, 80 Am. St. R. 29; *Hislop v. Ordner*, 28 Tex. Civ. App. 540, 67 S. W. R. 337; *Willett v. Rich*, 142 Mass. 356, 7 N. E. R. 776, 56 Am. R. 684.

§ 18. **Consideration.**—Like every contractual relation the bailment must be upon consideration. In gratuitous bailments this consists, not in any benefit to the promisor, but in detriment to the promisee. In the bailment for the sole benefit of the bailor, this detriment arises from the fact that the bailee, by undertaking the service, prevents the bailor from securing another to perform it, while in a bailment for the benefit of the bailee it is the bailee who is prevented from securing the benefit at the hands of another. It follows, then, that until the bailee, in the first case, has entered upon the undertaking, or in the second, until the bailor has loaned the chattel, there is no consideration. Hence there can be no liability for non-feasance but only for misfeasance, in gratuitous bailments.

§ 19. **Expenses.**—In the absence of a special contract, ordinary expenses for caring for the chattel are to be borne by the bailee, extraordinary expenses by the bailor, unless they arise from default on the part of the bailee, when the latter will be liable for the consequences of his own fault. It follows that, for extraordinary expenses necessary for proper preservation of the bailed chattel, the bailee may bind the bailor by a contract with third persons.

§ 20. **Defect in bailed chattel.**—The bailor owes the bailee the duty to inform him of defects in the bailed article which are, or reasonably should be, known to the bailor, and which are likely to be the source of danger to the bailee. For any injury suffered by the bailee in consequence of his failure so to do, the bailor is liable, unless the defects were patent and equally within the knowledge of both parties.

§ 21. **Right to use.**—The bailee has no right to use the chattel unless it appears from the bailment contract, or from the circumstances, that the consent of the owner to the use may

§ 18. [1] *Coggs v. Bernard*, 2 Dana, 69 N. H. 264, 39 Atl. R. 982, 1d. Raymond 909, 1 Sm. Lead. Cas. 76 Am. St. R. 170.

199; [10] *Thorne v. Deas*, 4 Johns. (N. Y.) 84. § 21. [12] *Wentworth v. McDuffie*, 48 N. H. 402; [34] *Spooner*

§ 19. *Harter v. Blanchard*, 64 Barb. (N. Y.) 617; [11] *Leach v. French*, 69 Me. 389, 31 Am. R. 296. v. Manchester, 133 Mass. 270, 43 Am. R. 514; *Ray v. Tubbs*, 50 Vt. 688, 28 Am. R. 519; *Alvord v.*

§ 20. *Hadley v. Cross*, 34 Vt. 586, 80 Am. D. 699; *Gagnon v. Davenport*, 43 Vt. 30.

fairly be presumed. Such consent will be presumed in so far as the use of the chattel is necessary to its preservation.

If the bailee without authority use the thing, or if having authority he use it in a manner unauthorized, he does so at his peril and is absolutely liable for any loss or injury that may result. His wrongful use, as will appear later, in many cases amounts to a conversion of the chattel.

§ 22. **Property of bailee.**—In general, the bailee has a special property in the thing bailed while the general property remains in the bailor. It is a disputed point whether the possessory interest of the gratuitous bailee, or of the bailee at will, amounts to a property interest. All agree, however, that the interest of the bailee is such as to enable him to maintain trespass or trover against third persons who interfere with his possession. All, except gratuitous bailees, may also maintain replevin, an action founded upon a property right, while right of possession is sufficient basis for trespass or trover. Even the bailee who is a finder has a title good against all the world except the true owner and may maintain his possessory rights by appropriate actions.

The bailor, also, has a right of action in replevin, trover, trespass, or case, against a wrong-doer, but a recovery by either is a bar to an action by the other.

§ 23. **Liability to third persons.**—If the bailee's use of the chattel result in injury to third persons he alone is responsible, he alone has control of the chattel, and he is not, in its use, the agent of the bailor. The bailee is also liable for injuries resulting from the use of the chattel by his servants acting in the course of their employment.

§ 22. [13] *Armory v. Delamirie*, rule in *Hostler's Adm'r v. Skull*, 1 *Strange* 505, 1 *Sm. Lead. Cas.* 2 *Haywood* (N. C.) 179, 1 *Am. D.* 470; [14] *Little v. Fossett*, 34 *Me.* 583.
 545, 56 *Am. D.* 671; *Baggett v. McCormack*, 73 *Miss.* 552, 19 *So. R.* 89, 55 *Am. St. R.* 554. See the early

§ 23. *Sproul v. Hemmingway*, 14 *Pick. (Mass.)* 1, 25 *Am. D.* 350.

§ 24. Termination of bailment.—Like other contractual relations, the bailment relation may be terminated—

A. BY ACT OF THE PARTIES.

1. By the accomplishment of the bailment purpose or the expiration of the time for which the property was bailed.
2. By the rescission of the bailment contract. This may be—
 - (1) By mutual consent of bailor and bailee.
 - (2) By redelivery of the chattel by the bailee.
 - (3) By abatement of the contract by the bailor.

B. BY OPERATION OF LAW.

1. By change in the status of the parties.
2. By change in the status of the bailed chattel.

A. TERMINATION BY ACT OF THE PARTIES.

1. *Accomplishment of purpose or efflux of time.*

§ 25. Bailment contract executed.—When the purpose of the bailment is fully accomplished, or the time for which the property was bailed has expired, the life of the bailment is ended and the bailee is bound to dispose of the bailed chattel as directed by the bailor, or excuse his failure so to do. If he does not, the bailor may treat his failure as conversion of the property, or as a renewal of the bailment for a new period on the same terms.

2. *Rescission of the Bailment Contract.*

§ 26. (1.) By act of both parties.—Like other contracts, bailments may be terminated at any time by mutual consent of the parties. The law has no interest in requiring the full performance of a contract which both parties desire to renounce.

§ 27. (2.) By act of bailee.—The bailee has always the

§ 25. [15] *Green v. Hollingsworth*, 5 Dana (Ky.) 173, 30 Am. Carriers, §§ 418, 418a. D. 680; *Benje v. Creagh*, 21 Ala. 151. See *Schouler*, *Bailments & Carriers*, § 159; *Story*, *Bailments & Carriers*, § 259.

§ 26. See *Story*, *Bailments & Carriers*, §§ 418, 418a.

§ 27. *Story*, *Bailments & Carriers*, §§ 202, 258, 271.

power, though not usually the right, to terminate the bailment at any time. The bailor has no action at law to compel the bailee to retain the chattel and perform the bailment purpose. And equity will not decree specific performance of personal services, nor will it, where damages are adequate, grant an injunction to prevent the return of the chattel bailed. The bailor is left to an action for such damages as he can show he has suffered by reason of the bailee's wrong.

In gratuitous bailments, the bailee need not enter upon the undertaking, and in bailments for his sole benefit even after the chattel has been delivered to the bailee, he has the right to return it at any time. A depositary or mandatary, however, though he is to receive no compensation, has no right after he has entered upon the undertaking to abandon it to the injury of the bailor. Common carriers and innkeepers are subject to special rules.

§ 28. (3.) **By act of bailor.**—The bailor's power to terminate the relation depends upon the nature of the contract. In bailments at will and in bailments for his sole benefit, the bailor may end the relation at any time. In bailments for the benefit of the bailee for an indefinite term, there must be a demand by the bailor and a reasonable time for the return of the chattel by the bailee. The bailee's rights cannot be wantonly disregarded. In bailments for a definite time or purpose, the bailee may hold the chattel even against the bailor.

§ 29. —**Bailee's wrong.**—The bailee's wrong, it is usually held, does not terminate the relation but gives the bailor the right to do so at any time. Thus, the use of the chattel in a different manner or for a different purpose from that agreed upon, its appropriation or sale by the bailee, his refusal to redeliver it, may be treated by the bailor as ground for terminating the bailment, and in many cases for suing the bailee in trover for conversion.

§ 28. [33] *Cobb v. Wallace*, 5 § 29. [15] *Green v. Hollings-*
Cold. (Tenn.) 539, 98 Am. D. 435; worth, 5 Dana (Ky.) 173, 30 Am.
Smith v. Niles, 20 Vt. 315, 49 Am. D. 680; [12] *Wentworth v. Me-*
D. 782; *Story, Bailments & Carriers*, Duffie, 48 N. H. 402; *Schouler*,
§§ 119, 210; *Schouler, Bailments &* *Bailments & Carriers*, §§ 56, 156.
Carriers, § 81.

B. BY OPERATION OF LAW.

§ 30. 1. **By changed status of the parties.**—There are cases in which the happening of some event so affects the performance of the bailment contract as to terminate the relation by operation of law. In other cases the happening of the same event, though not *ipso facto* a termination of the relation, is nevertheless a sufficient cause for the termination of the contract by one of the parties.

§ 31. —**Death.**—The death of either bailor or bailee will terminate the relation unless the contract is of such a nature that it can be performed by the personal representative of the deceased. Thus, the hire of personal services about a chattel involves a personal trust that ceases at the death of the bailee. And death, if not *ipso facto* a termination of the relation, is usually held to justify either party or his representative in terminating it, but not so as to absolve the parties from antecedent liabilities of the bailment.

§ 32. —**Bankruptcy, marriage, insanity.**—Any change in legal status of either party, as by bankruptcy, marriage of the woman at common law, insanity, probably terminates the bailment relation as it does that of agency, at least so far as the performance of the bailment purpose depends upon the party whose status is thus affected.

§ 33. 2. **Change of status of bailed chattel.**—If the bailee becomes full owner, or if the subject-matter of the contract is destroyed, the bailment relation at once ceases. The liability of the bailee when the subject-matter of the bailment is destroyed will be hereafter considered.

§ 34. **Redelivery.**—It has already been said that upon termination of the bailment the bailee must deal with the chattel according to the directions of the owner, upon peril of liability for loss if he fails to do so. It is now in order to inquire what is to be redelivered, and where and to whom the redelivery is to be made.

§ 35. —**What is to be redelivered.**—As already indicated, the identical thing bailed is to be returned in its condition at

§ 30. Schouler, Bailments & Carriers, §§ 277, 418, 419; Schouler, Bailments & Carriers, §§ 56, 61.

§ 31. Story, Bailments & Carriers, § 35. Atkins v. Gamble, 42 Calif.

the termination of the bailment. In the case of stocks or bonds, others of different numbers but representing the same property may be substituted for the stocks or bonds bailed. In addition to the chattel itself, however, the bailee is bound to return all increase of it, such as the young of animals and dividends and interest from stocks and bonds. If the chattel is returned in an injured or depreciated condition, the bailee is always liable for such loss when it was due to his failure to use the requisite care.

§ 36. — **Where returned.**—The place where delivery is to be made is to be gathered, if possible, from the contract. In the absence of a contract, custom, usage, and the nature of the bailment often determine the place of delivery. In gratuitous bailments the party receiving no advantage should be especially considered and his convenience consulted. In all bailments there is a natural presumption, in the absence of other indications, in favor of the place of business or residence of the bailor, or of the party to whom he has directed delivery to be made.

§ 37. — **To whom redelivered.**—The bailment contract usually determines whether the property is to be redelivered to the bailor or his agent, or to some third person. In the case of a bailment with an option to purchase the property may be retained by the bailee.

The exercise of care, however great, affords no excuse for delivery to the wrong person. All bailees must at their peril deliver to the proper party. Failure to do so amounts to conversion by the bailee, even though he may have acted in good faith, and so does refusal to deliver to the rightful claimant. In case of change of residence of the proper party the bailee should make reasonable efforts to discover his new location and in case of his death delivery should be made, ordinarily, to his personal representative.

As already indicated, a bailee cannot set up against his

86, 10 Am. B. 282; [16] Allen v. Plains Co. v. R. R., 1 Gray (Mass.)
 Delano, 55 Maine 113, 92 Am. D. 263, 61 Am. D. 423.
 573; [2] Krause v. Commonwealth, § 37. [3] Pulliam v. Burlin-
 93 Pa. St. 418, 39 Am. B. 762. game, 81 Mo. 111, 51 Am. R. 229;
 § 36. [17] Esmay v. Fanning, 9 The Idaho, 93 U. S. 575, see Sec.
 Barb. (N. Y.) 176; [113] Norway 7, ante.

bailor the claims of himself or of any other parties, but he will always be protected by delivery to the rightful owner.

§ 38. —**Adverse claims.**—The bailee is justified in delivering to the bailor, even when he is not the owner, unless he has notice of adverse claims. In such case he should notify the bailor and give him opportunity to defend against such adverse claimants, or if there be privity between the bailor and the third parties the bailee may require them to interplead.

§ 39. **Special contract.**—Finally, it is important to notice that the parties may always define their rights and liabilities by special contract, unless such contract is illegal or contrary to public policy. A contract to hire property for an illegal purpose, or to relieve the bailee from all responsibility for his negligence or fraud would be invalid. But the terms of any legal contract entered into by the parties will govern their relations in so far as those terms are clear in their import. It must be understood, then, that the foregoing principles are within the above limits subject to enlargement or retraction by the contract of the parties.

§ 38. [3] Pulliam v. Burlin- Ball v. Liney, 48 N. Y. 6, 8 Am. R. game, 81 Mo. 111, 51 Am. R. 229; 511. Note to 91 Am. St. R. 608.

PART II.

OF ORDINARY BAILMENTS.

I. OF GRATUITOUS BAILMENTS.

CHAPTER III.

A. OF GRATUITOUS SERVICES.

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| <p>§ 40. Classification.
 <i>A. Gratuitous Services.</i></p> <p>41. Deposits and mandates compared.</p> <p>42. —Comparison with Latin <i>depositum</i> and <i>mandatum</i>.</p> <p>43. The general principles of bailments apply.</p> <p>44. Division of the subject.
 <i>1. Nature of deposits and mandates.</i></p> <p>45. No compensation.</p> <p>46. Special bank deposits.</p> | <p>§ 47. Involuntary deposits.
 <i>2. Rights and duties of the parties.</i></p> <p>48. Diligence.</p> <p>49. —Same care as of one's own.</p> <p>50. —Special skill.</p> <p>51. —Facts equally within knowledge of both parties.</p> <p>52. —Misfeasance and nonfeasance.</p> <p>53. Right to use.
 <i>3. Termination of the relation.</i></p> <p>54. Special rules.</p> |
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§ 40. **Classification.**—There are two classes of gratuitous bailments—

- A. *Gratuitous services* by the bailee, or bailments for the sole benefit of the bailor, including
1. *Deposits*, which are gratuitous bailments of goods for custody or safe keeping, and
 2. *Mandates*, which are bailments of goods for the performance of some service upon them by the bailee gratuitously.
- B. *Gratuitous loans* by the bailor, which is the Roman *commodatum*, a bailment of a chattel for use by the bailee *gratis*.

§ 40. [6] *Gray v. Merriam*, 148 Ill. 179, 35 N. E. R. 810, 39 Am. St. R. 172.

A. OF GRATUITOUS SERVICES.

§ 41. **Deposits and mandates compared.**—The bailor who makes a deposit is called a *depositor*, his bailee, the *depository*. In mandates the corresponding parties are called the *mandator* and *mandatary*.

Formerly, the two bailments were separately treated. The deposit was said to consist in custody, the mandate in feaseance. But in fact, both custody and service of some sort are involved in each bailment, and hence the obligations of the parties are subject substantially to the same rules. The only distinction is one of emphasis. In deposits custody is the chief purpose, feaseance is incidental. In mandates service is primary, custody the incident.

§ 42. **Comparison with Latin depositum and mandatum.**—The term deposit is, unfortunately, one of varied meanings. The ordinary or general bank "deposit" creates the relation of debtor and creditor, and is not a bailment at all. What bankers call "special deposits" are bailments, but only those for which the bank charges no compensation belong to the bailment known as a *deposit*. The word is derived from the Latin *depositum*, but the *depositum* of the Roman law was of broader application, and involved distinctions of no consequence in our law.

The term *mandate* is equally indefinite and varied in its meaning. See the word "mandate" in a law dictionary. The Roman *mandatum*, from which our word is borrowed, includes any gratuitous agency, bailment or other.

§ 43. **The general principles of bailments**, already noted, are applicable to gratuitous bailments. The essentials of a contract as to competent parties, assent, and subject-matter, call for no special notice here. As already seen (§ 18), the consideration in gratuitous bailments is the detriment to the promisee, who by the undertaking of the promisor is prevented from securing the desired benefit at the hands of another.

§ 41. Story, *Bailments & Carriers*, § 140.

§ 42. Story, *Bailments & Carriers*, §§ 44, 45, 84, 88; Schouler, *Bailments & Carriers*, § 26, note.

§ 43. [1] *Coggs v. Bernard*, 2 Ld. Raymond 909, 1 Sm. Lead. Cas.

199.

§ 44. **Division of the subject.**—In the following sections principles which apply particularly to bailments of gratuitous services will be considered as follows: 1. The nature of the relation. 2. Its resulting rights and duties. 3. Its termination.

1. NATURE OF DEPOSITS AND MANDATES.

§ 45. **No compensation.**—It is the absence of any recompense, direct or indirect, that marks this class of bailments. Any legal benefit to the promisor, even though an indirect one, takes the bailment out of this class, and makes it a mutual benefit bailment. It is not strange, therefore, that the cases arising in this class of bailments are comparatively few.

§ 46. **Special bank deposits.**—Banks frequently receive for deposit in their safes boxes or packages containing the money or other valuables of favored individuals. For this the bank receives no compensation, it has no right to use or even examine the contents, and upon demand of the depositor must return the specific valuables in bulk as they were deposited. These *special deposits* form no part of the bank's regular business, and no bank officer has any authority to bind the bank to such a bailment without the expressed or implied assent of the directors. It is settled by the weight of authority that where a cashier or other officer is known by the directors to be in the habit of receiving such deposits, the bank is a gratuitous bailee of all special deposits so received. The contract is not *ultra vires* even in the case of national banks.

§ 47. **Involuntary deposits** arise when through flood or other disaster goods are cast upon the land of one not their owner. If this happens without fault of the owner, the depository is a gratuitous bailee and must allow the owner to

§ 45. Compare [18] Newhall v. tional Bank v. Graham, 100 U. S. Paige, 10 Gray (Mass.) 366; 699; [7] Preston v. Prather, 137 [7] Preston v. Prather, 137 U. S. U. S. 604, 11 Sup. Ct. 162; but com- 604; First National Bank v. Graham, pare First National Bank v. Ocean 100 U. S. 699; see also [6] Gray v. National Bank, 60 N. Y. 278, 19 Merriam, 148 Ill. 179, 35 N. E. R. Am. R. 181. See also Goodwin v. 810, 39 Am. St. R. 172; Woodruff v. Ray, 108 Tenn. 614, 69 S. W. R. Painter, 150 Pa. St. 91, 24 Atl. R. 730, 91 Am. St. R. 761.

§ 47. See Story, Bailments & Carriers, § 83, a.

§ 46. [19] Foster v. Essex Bank, 17 Mass. 479, 9 Am. D. 168; Na-

remove the goods. If the owner was at fault, however, it would seem that he has no right to enter and remove without recompensing the depositary, but the latter has no right to use or appropriate to himself the goods cast upon him.

2. RIGHTS AND DUTIES OF THE PARTIES.

§ 48. **Diligence.**—It is the first duty of the bailee to take reasonable care of the bailed chattel. As he receives no benefit the care required is slight diligence, and it is said that he is liable only for gross negligence. What is reasonable care will depend on the nature and value of the bailed chattel, the circumstances of the undertaking, and the contract of the parties. This contract may enlarge or limit the liability so as to make the bailee an insurer or free from any liability for less than negligence amounting, in legal effect, to fraud, which no contract can excuse.

§ 49. —**Same care as of one's own.**—It has often been suggested that if the bailee takes the same care of the bailed goods as of his own he is free from liability. But one may take risks with his own that he has no right to take with another's property. Taking such care of the bailed goods as of one's own repels a presumption of gross negligence, but this may be overcome and liability fastened upon the bailee, nevertheless, by showing want of slight diligence. The question is not one of the care exercised by an individual but by a class. Slight care is not that which an individual may bestow in a given case, but which men of a class are wont to bestow in such a case.

§ 50. —**Special skill.**—It has been held that one holding

§ 48. [1] *Coggs v. Bernard*, 2 Ld. Ray. 909, 1 Sm. Ld. Cas. 199; [19] *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. D. 168; [6] *Gray v. Merriam*, 148 Ill. 179, 35 N. E. R. 810, 39 Am. St. R. 172; *First National Bank v. Graham*, 100 U. S. 699; [7] *Preston v. Prather*, 137 U. S. 604, 11 Sup. Ct. 162; *Jenkins v. Bacon*, 111 Mass. 373, 15 Am. R. 33; *Eddy v. Livingston*, 35 Mo. 487, 88 Am. D. 122; [20] *Knowles v. Atlantic etc. R. R. Co.*, 38 Me. 55, 61 Am. D. 234.

§ 49. [1] *Coggs v. Bernard*, 2 Ld. Ray. 909, 1 Sm. Ld. Cas. 199; *First National Bank v. Graham*, 79 Pa. St. 106, 21 Am. R. 49; [5] *Doorman v. Jenkins*, 2 Ad. & El. 256, 29 E. C. L. 80; [6] *Gray v. Merriam*, 148 Ill. 179, 35 N. E. R. 810, 39 Am. St. R. 172; *Conner v. Winton*, 8 Ind. 315, 65 Am. D. 761; [20] *Knowles v. Atlantic etc. R. R. Co.*, 38 Me. 55, 61 Am. D. 234.

§ 50. [6] *Gray v. Merriam*, 148 Ill. 179, 35 N. E. R. 810, 39 Am. St.

himself out as having special skill must exercise such skill or he will be liable, even though he receive no recompense for the service. Want of skill in this case is said to be imputable to gross negligence.

§ 51. — **Facts equally within the knowledge of both parties.**—And it is said that if the loss results from conditions equally within the knowledge of the bailor and bailee the former cannot maintain an action against the latter. Thus, if the character and habits of the bailee, or the place where the goods are to be deposited are known to the bailor, he is presumed to assent to such conditions and is estopped from setting up any loss therefrom.

§ 52. — **Misfeasance and nonfeasance.**—While the detriment to the bailee is held to furnish sufficient consideration to uphold the contract, yet the law does not recognize this detriment until the bailee has entered upon the undertaking. Until that moment the bailor is still at liberty to secure another to do the service. Accordingly the gratuitous bailee is not liable for any injury arising from nonfeasance, from his entire failure to perform, but only from misfeasance, from his defective performance amounting to gross negligence. The bailee is liable for misfeasance but not for nonfeasance.

§ 53. **Right to use.**—Any advantageous use by the bailee would make the relation a mutual benefit bailment. Only such use as is incidental to the proper preservation of the thing, as exercise of a horse, is allowed. If the bailee uses the thing, not only does the bailment become a mutual benefit bailment demanding of the bailee its larger measure of diligence, but if the use be unauthorized the bailee becomes absolutely liable for the safety of the chattel and is responsible for loss to it arising from any cause whatever.

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| R. 172; [135] Steamboat New World v. King, 16 How. (U. S.) 469; [7] Preston v. Prather, 137 U. S. 604; Isham v. Post, 141 N. Y. 100, 35 N. E. R. 1084, 38 Am. St. R. 766; Eddy v. Livingston, 35 Mo. 487, 88 Am. D. 122; Shiells v. Blackburn, 1 H. Bl. 158. | 55, 61 Am. D. 234; Parker v. Union Ice and Salt Co., 59 Kan. 626, 54 Pac. R. 672, 68 Am. St. R. 383. § 52. [10] Thorne v. Deas, 4 Johns. (N Y.) 84. § 53. [6] Gray v. Merriam, 148 Ill. 179, 35 N. E. R. 810, 39 Am. St. R. 172; [7] Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162; Alvord v. Davenport, 43 Vt. 30; [20] Knowles v. Railroad, 38 Me. |
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3. TERMINATION OF THE RELATION.

§ 54. **Special rules.**—The various modes of terminating a bailment have been already discussed (§ 24). In gratuitous bailments the bailee has nothing to gain by continuing the relation. The bailor, therefore, may terminate it at any time, but must have regard for the convenience of the bailee, making demand and allowing a reasonable time for the bailee to make delivery. The same privilege of terminating the relation at will belongs to the bailee, unless he has undertaken the custody for a fixed time or has agreed to carry to a definite place, in which case he must after entering upon performance complete it or he is liable to the bailor for any damage due to his default. Redelivery must be made to the proper party at the bailee's peril.

§ 54. *Winkley v. Foye*, 33 N. H. St. R. 761; *Story, Bailments & Carriers*, § 208-210; *Wear v. Gleason*, 171, 66 Am. D. 715; *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25, 52 Ark. 364, 12 S. W. R. 756, 20 Am. D. 596; *Goodwin v. Ray*, 108 Am. St. R. 186, 69 S. W. R. 730, 91 Am. Tenn. 614.

CHAPTER IV.

B. OF GRATUITOUS LOANS.

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| § 55. Definition of <i>commodatum</i> . | § 59. Care. |
| 1. Nature of the relation. | 60. —Better care than of one's own. |
| 56. Contract necessary. | 61. Right to use. |
| 57. No recompense. | 3. Termination of the relation. |
| 58. Special property of bailee. | 62. Special rules. |
| 2. Rights and duties of the parties. | 63. Restoration to bailor. |

§ 55. **Definition.**—The gratuitous loan, or *commodatum*, is the bailment of a chattel for use by the bailee *gratis*.

The English loan includes, beside the gratuitous loan for use, the loan of money for hire, and the loan of goods for consumption, the Latin *mutuum*, neither of which is a bailment. The word "borrow" is also used in the three senses. In the present chapter "loan" and "borrow" must be understood to refer to the loaning or borrowing of a chattel for use by the bailee, or *borrower*, without compensation to the bailor, or *lender*. Following the classification of the last chapter, we shall consider: 1, the nature of the relation; 2, its rights and duties, and 3, its termination.

1. NATURE OF THE RELATION.

§ 56. **Contract necessary.**—The law will never impose upon the owner the necessity of loaning his chattel gratuitously, hence gratuitous loans arise only from contract. Any chattel which would not be consumed in the use may be the subject of a loan.

§ 57. **No recompense.**—It is of the essence of this bailment that it is for the sole benefit of the bailee. Any legal benefit derived by the bailor would make the relation the more com-

§ 55. [1] *Coggs v. Bernard*, 2 Ld. Raymond 909, 1 Sm. Lead. Cas. 199.
§ 57. [10] *Thorne v. Deas*, 4 Johns. (N. Y.) 84.

mon mutual benefit bailment. As the use is gratuitous it follows that there cannot be an executory contract for a loan, for the consideration arises only when the undertaking has been entered upon.

§ 58. **Special property of bailee.**—Whether the borrower has a special property in the thing bailed has been disputed. In the loan at will the right of the bailee would seem to be too precarious to amount to property. But when the loan is for a definite period it would seem that the lender may not terminate it before the expiration of that period or he will be liable to the bailee for any resulting damage. No reason is apparent for denying the property interest of such a borrower. The borrower may maintain trespass or trover against third persons who interfere with his possession of the loan.

2. RIGHTS AND DUTIES OF THE PARTIES.

§ 59. **Care.**—The borrower, though not an insurer of the goods, is held to the highest degree of care. As he enjoys their use *gratis*, it is but fair to exact of him the diligence of the most careful men in the conduct of their own affairs. For even slight negligence he is responsible to the bailor for any damage to the goods caused thereby.

§ 60. —**Better care than of one's own.**—Whether the borrower is liable if he saves his own goods from peril, such as a fire, and allows the borrowed goods to be destroyed has been much argued. It has been said that the goods of greatest value should be saved first, but value is only one condition and not always the controlling one. The real question, as suggested by Judge Story, is whether the borrower has been guilty of any negligence. The position of the chattels, their weight, bulk, etc., are often determining factors in deciding which shall be rescued first. The conditions being the same, the borrower could not be justified in saving his own in preference to the lender's goods.

§ 58. [14] *Little v. Fossett*, 34 Me. 545, 56 Am. D. 671. v. *Schultz*, 44 Mich. 529, 7 N. W. R. 225, 38 Am. R. 280. Compare

§ 59. [15] *Green v. Hollingsworth*, 5 Dana (Ky.) 173, 30 Am. D. 680; [8] *Wilson v. Brett*, 11 Mees & W. 113; *Stewart v. Davis*, 31 Ark. 518, 25 Am. R. 576; *Beller*

[1] *Coggs v. Bernard*, 2 Ld. Raymond, 909, 1 Sm. Lead. Cas. 199. § 60. *Story, Bailments & Carriers*, § 245-251.

§ 61. **Right to use.**—Use is the gist of this bailment, and the bailee has the right to use the chattel in accordance with the terms of the bailment contract. A slight departure from the bailment purpose is at the peril of the bailee and makes him absolutely liable for any damage to the property. There is even greater reason why the borrower should be strictly confined to the contemplated use of the chattel than exists in the case of other bailees. So for any fraud in procuring the loan the bailee is liable.

3. TERMINATION OF THE BAILMENT.

§ 62. **Special rules.**—Unless the lending be for a definite period or for a specified purpose, it would seem reasonable that the bailor should be able to terminate the relation at will. It has been suggested that he must not do this so as to cause damage to the bailee, but justification of such a rule is difficult in the absence of compensation or of any agreement for a definite time or purpose, at least unless he flagrantly disregards the needs of the borrower. If, however, the loan was expressed to be for a certain period or purpose, the borrower has the right to retain the chattel until the expiration of the time or the accomplishment of the purpose, when it becomes his duty to restore it.

§ 63. **Restoration to bailor.**—Restitution must be made to the bailor even when he is not the owner of the thing. Owners have sometimes attempted to recover property from the wrongful possession of another by borrowing it and then refusing to redeliver. But this is disputing the bailor's title, which the bailee may never do, except where he has yielded to title paramount in some third person. The borrower must restore the thing before he can set up any claim in himself.

§ 61. [15] *Green v. Hollingsworth*, 5 Dana (Ky.) 173, 30 Am. D. 680; *Beller v. Schultz*, 44 Mich. 529, 7 N. W. R. 225, 38 Am. R. 280; *Stewart v. Davis*, 31 Ark. 518, 25 Am. R. 576.

76 Am. D. 315; *Root v. Chandler*, 10 Wend. (N. Y.) 110, 25 Am. D. 546; *Clapp v. Nelson*, 12 Tex. 370, 62 Am. D. 530.

§ 62. [3] *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. R. 229; *Walker v. Wilkinson*, 35 Ala. 725,

§ 63. *Simpson v. Wrenn*, 50 Ill. 222, 99 Am. D. 511; [3] *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. R. 229.

II. OF MUTUAL BENEFIT BAILMENTS.

CHAPTER V.

CLASSIFICATION AND GENERAL PRINCIPLES.

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| § 64. Classes of mutual benefit bailments. | 2. <i>Rights and duties of the parties.</i> |
| 1. <i>Nature of the relation.</i> | § 67. Care. |
| 65. Recompense. | 3. <i>Termination of the relation.</i> |
| 66. Custody and service. | 68. Not precarious. |

§ 64. **Classes.**—Bailments for the mutual benefit of bailor and bailee include—

- A. *Pignus*, or pledge, and
- B. *Locatio*, or hiring. Bailments for hire are—
 - 1. *Locatio rei*, the hired use of a thing, and
 - 2. *Locatio operis*, hired services about a thing.
 - a. Ordinary bailments for hire.
 - (1) *Locatio custodiae*, hired custody of a thing.
 - (2) *Locatio operis faciendi*, hired services upon a thing.
 - (3) *Locatio operis mercium vehendarum*, hired carrying of a thing.
 - b. Extraordinary bailments for hire, which are the bailments entered into by—
 - (1) Innkeepers as to the baggage of their guests, and
 - (2) Common carriers of goods.

We shall also have to consider the relations of innkeepers to the persons of their guests and of common carriers to their passengers, which are not bailment relations, but are governed by similar principles. In the present chapter will be considered some fundamental distinctions applying to all mutual benefit bailments, as regards: 1, the nature of the relation; 2, its rights and duties, and 3, its termination.

1. THE NATURE OF THE RELATION.

§ 65. **Recompense.**—It is characteristic of this bailment that there is compensation to the promisor. This may be slight, indirect or incidental, but it must amount to a legal benefit. Thus, if A lets his horse to B, nominally *gratis*, but really on consideration that B will furnish feed and care for the horse, the bailment is not a *commodatum*, but a *locatio*. So if B agrees to keep A's horse *gratis*, but uses it for his own purposes, beyond the exercise needed to maintain the horse in good condition, B is not a depositary, but a bailee for hire, the bailment is a *locatio rei*, both bailor and bailee derive a legal benefit.

§ 66. **Custody and services.**—Distinctions have often been attempted between bailments for custody and for services. There is no such absolute distinction. The leading purpose in some bailments is custody, in others services, but in all custody is necessary and some services as well. The pledgee has custody primarily but must perform such services as are needed to preserve the chattel, and the workman employed primarily to repair a chattel must incidentally keep it in his custody. The real question of importance is, not was it a bailment for custody or for services, but has the bailee fulfilled with the required diligence the bailment purpose, both as regards custody and services.

2. RIGHTS AND DUTIES OF THE PARTIES.

§ 67. **Care.**—In ordinary mutual benefit bailments the diligence demanded of the bailee is ordinary care in view of all the conditions. What this is has already been explained in general (§§ 15, 16), and will later be more specifically illustrated.

In extraordinary mutual benefit bailments exceptional care is required amounting, as will later appear, in the case of innkeepers and of common carriers of goods and baggage to insurance against losses to the goods while in the hands of the bailee.

§ 65. [18] *Newhall v. Paige*, 10 Gray (Mass.) 366; *Woodruff v. Painter*, 150 Pa. St. 91, 24 Atl. R. 621, 30 Am. St. R. 786; *Chamberlain v. Cobb*, 32 Ia. 161, *Vigo Agricultural Society v. Brumfiel*, 102 Ind. 146, 1 N. E. R. 382, 52 Am. R. 657.

3. THE TERMINATION OF THE RELATION.

§ 68. **Not precarious.**—Mutual benefit bailments are not often at will. Each party gives value to the other and thereby acquires legal rights of a substantial nature which the other is bound to respect. The relation, therefore, is not to be lightly terminated, either by one of the parties or by operation of law, until the time has expired or the purpose has been accomplished. Subject to these conditions, the relation may be terminated as has been previously pointed out (§§ 24-38).

§ 68. [33] Cobb v. Wallace, 5 Cold. (Tenn.) 539, 98 Am. D. 435.

CHAPTER VI.

A. PIGNUS, OR PLEDGE.

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 1. <i>Nature of the relation.</i>
 70. Bailment the incident.
 71. —The pledge contract.
 72. Distinction between pledge,
 chattel mortgage and lien.
 73. —Intention governs.
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 75. —Incorporeal property.
 76. —Corporate stock.
 77. —Exceptions.
 78. Delivery.
 79. The obligation secured.
 80. —Limitations.
 2. <i>Rights and duties of the parties.</i>
 81. Custody.
 82. Profits and expenses.
 83. Right to use.
 84. Assignment by the pledgee.
 85. —Negotiable instruments.
 86. —Corporate stock.
 87. —Rights of pledgee.
 88. —Bills of lading, ware-
 house receipts.
 89. Care.
 90. Proceeds of collateral.
 91. Conversion by pledgee.
 92. —The measure of dam-
 ages.</p> | <p>§ 93. Pledgor warrants his title.
 94. Property of pledgor.
 3. <i>Termination of the pledge.</i>
 95. Classification.
 A. <i>Termination by act of the parties.</i>
 1. <i>By act of the pledgor.</i>
 96. (1) Full performance.
 97. (2) Default of pledgor.
 98. —Remedies of the pledgee.
 99. —a. Suit on the debt.
 b. Exercise power of sale.
 100. —(a) Sale at com-
 mon law.
 101. —Choses in action.
 102. —(b) Sale in equity.
 103. —(c) Special con-
 tract.
 104. —(d) Statutory sale.
 105. —Equitable principles apply.
 106. —Equity of redemp-
 tion.
 2. <i>By act of the pledgee.</i>
 107. (1) Termination by consent
 of pledgee.
 108. (2) Wrong of pledgee.
 109. Redelivery.</p> |
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§ 69. **Definition.**—A *pignus*, or pledge, is a bailment to secure the performance of an obligation, with power of sale in case of default.

§ 69. [1] *Coggs v. Bernard*, 2 199; [21] *Stearns v. Marsh*, 4 Ld. Raymond 909, 1 Sm. Lead. Cas. Denio (N. Y.) 227, 47 Am. D. 248;

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Pawn, pledge, collateral security, are words of varying degrees of respectability designating essentially the same sort of transaction. Whether the *pawnor* or *pledgor* deals with the *pawnee* or *pledgee* under the historic, and sometimes unsavory, name of pawnbroker, or with the modern collateral security bank, or the great loan and security corporations, or the banks that furnish in support of commercial enterprises vast sums whose repayment is secured by the deposit of all sorts of personal property, the legal relations of the parties are subject to the same rules.

1. THE NATURE OF THE RELATION.

§ 70. **Bailment the incident.**—A pledge differs from other bailments in that the bailment is secondary, a mere incident to the primary contract the performance of which is secured by the pledge. This primary contract is usually an undertaking to pay a debt, but it may be any other engagement.

§ 71. —**The pledge contract.**—The pledge is first a contract and second a bailment, and the general principles before referred to, competency of parties, consideration, mutuality, delivery, etc., apply to the pledge. An agent may be authorized to pledge the property of his principal, a partner may pledge the partnership goods to secure a partnership debt, but not his personal engagement, and a corporation may pledge its corporate property to secure the performance of an obligation not *ultra vires*, subject to the usual restrictions of agency, partnership, and corporate powers.

§ 72. **The distinction between pledge, chattel mortgage, and lien** often becomes important because of different methods of applying the security to extinguish the debt. The chief distinction in law between the pledge and mortgage is one of title. The pledgee secures only a special property ac-

[22] *Hall v. Page*, 4 Ga. 428, 48 Ala. 194, 28 So. R. 603, 85 Am. St. Am. D. 235; *Brewster v. Hartley*, 37 R. 21; [24] *Geilfuss v. Corrigan*, 95 Calif. 15, 99 Am. D. 237. Wis. 651, 70 N. W. R. 306, 60 Am.

§ 70. See 49 Am. D. 730, note.

§ 71. *Shaw v. Spencer*, 100 Mass. 382, 97 Am. D. 107.

§ 72. *Lucketts v. Townsend*, 3 Tex. 119; 49 Am. D. 723; [23] *American Pig Iron, etc., Co. v. German*, 126

Ala. 194, 28 So. R. 603, 85 Am. St. R. 21; [24] *Geilfuss v. Corrigan*, 95 Wis. 651, 70 N. W. R. 306, 60 Am. St. R. 143; *Tannahill v. Tuttle*, 3 Mich. 104, 61 Am. D. 480; *Bryson v. Rayner*, 25 Md. 424, 90 Am. D. 69; *Gilmer v. Morris*, 80 Ala. 78, 60 Am. R. 85; *Wright v. Ross*, 36 Calif. 414.

accompanied by possession; the mortgagee acquires at once the legal title with, or more often without, possession, subject to be defeated upon performance of the condition. The title of the mortgagee becomes absolute at law upon breach of the condition; the title of the pledgee never becomes absolute, but upon default he acquires a power of sale. Like the pledgee, the lien-holder has a special property and possession but he has no power of sale.

The mortgage, pledge, and lien are alike in that they are intended as security for a debt and are in equity subject to redemption upon payment of the debt, and it has been held that the two forms of security, pledge and mortgage, may be combined in one.

§ 73. — **Intention governs.**—In construing such contracts courts look to the intention of the parties. This, if clearly apparent, governs, rather than any name applied by the parties themselves. Thus, a bill of sale, a transfer of stock, an assignment of an incorporeal chattel, have been regarded as pledges or mortgages where other writings or the conduct of the parties made it clear to the court that such was their intention. If the debt be secured by delivery of possession of the chattel, the law prefers to regard the transaction as a pledge rather than a mortgage.

§ 74. **Subject-matter.**—"It has been doubted whether incorporeal things like debts, money and stocks, etc., which can not be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged, provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee."

Property not yet in existence, strictly speaking, cannot be pledged, but a contract of pledge is valid and when the property comes into existence, and the debtor takes possession, his

§ 73. [25] *Wilson v. Little*, 2 N. Y. 443, 51 Am. D. 307; [22] *Hall v. Page*, 4 Ga. 428, 48 Am. D. 235; *Lassiter*, 95 N. C. 88; *British Columbia Bank v. Marshall*, 8 Sawyer Am. D. 237. See also 22 Am. & Eng. Encyc. of Law 846, and cases cited.

§ 74. [25] *Wilson v. Little*, 2 N.

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rights as pledgee immediately attach. Thus, future crops, the increase of animals, and products of manufacture may be contracted in pledge.

And property by statute exempt from execution may, nevertheless, be pledged, just as it may be mortgaged or sold. So one having a special property in chattels may pledge his interest, and with the owner's consent one may pledge the property of another.

§ 75. — **Incorporeal property** is pledged by delivery of the paper which represents the property. This should be accompanied by written assignment or indorsement, but it has been held that this is not necessary, and manual delivery of a promissory note, bill of lading, warehouse receipt, policy of insurance, or savings-bank book, with the intention of pledging the property evidenced thereby, is an effectual pledge, vesting an equitable interest in the pledgee.

§ 76. — **Corporate stock.**—Subject to the liens and privileges imposed upon it by law, corporate stock may be and frequently is offered as collateral to secure debts. This is usually done by a written transfer of title which, like the delivery of possession, affords the evidence of the pledgee's special property in the chattel pledged. To make complete transfer of the shares mere delivery of the stock certificate is not enough. The by-laws of corporations usually require, in addition to the written assignment, a transfer of title on the books of the company; but this does not deprive the pledgor of his general property in the stock nor of his interest in the corporate funds.

§ 77. — **Exceptions.**—For reasons of public policy the law forbids the pledging of pensions and the pay of soldiers and sailors. And our national banks are forbidden to accept their own stock as security for a loan, unless it be necessary to

§ 75. [25] *Wilson v. Little*, 2 N. Hartley, 37 Calif. 15, 99 Am. D. 237. Y. 443, 51 Am. D. 307; [24] *Geilfuss v. Corrigan*, 95 Wis. 651, 70 N. Y. 443, 51 Am. D. 307; *Brewster v. W. R.* 306, 60 Am. St. R. 143; *Crain v. Paine*, 4 Cush. (Mass.) 483, 50 Am. D. 807; *Collins v. Dawley*, 4 Colo. 138, 34 Am. R. 72; *White v. Phelps*, 14 Minn. 27, 100 Am. D. 190. But compare *Brewster v.*

§ 76. [25] *Wilson v. Little*, 2 N. Y. 443, 51 Am. D. 307; *Brewster v. Hartley*, 37 Calif. 15, 99 Am. D. 237.

§ 77. *Merchants' Bank v. Hall*, 83 N. Y. 338, 38 Am. R. 434; *Schouler, Bailments & Carriers*, § 177.

secure a debt already contracted in good faith. By loans on such security the assets of a bank might be seriously impaired.

§ 78. **Delivery**, actual or constructive, is vital to a good pledge. As has before appeared, this may be manual delivery of the property or of the evidence of the property, or constructive delivery. Delivery to a third person, who holds possession as agent of the pledgee, is sufficient. In every case there should be such change of possession and indications of ownership as conditions permit. For the protection of the pledgee against third persons having claims against the pledgor, it is of prime importance that the property be placed beyond the control of the pledgor.

§ 79. **The obligation** secured by the pledge may be the payment of money or the performance of any other legal engagement. The debt secured may be present, past or future, absolute or conditional, one's own or that of another; it may include many debts, a single debt or any part of a debt; the security may be for obligations now outstanding, or be a continuing security against debts as they may arise.

However, if the debt be illegal the pledge is invalid; the law will aid neither party, but will leave them where it finds them. Neither can recover against the other if he must set up the illegal contract to do so.

§ 80. —**Limitations.**—But the pledge secures only the debt for which it was pledged and can not be held as security for other indebtedness, nor for a different or greater security than was intended.

The pledge does secure the performance of the whole and every part of the obligation, and no part of the pledge can be reclaimed by the pledgee until the entire engagement is performed.

§ 78. [24] *Geilfuss v. Corrigan*, *Boyd*, 44 Md. 47, 22 Am. R. 35; 95 Wis. 651, 70 N. W. R. 306, 60 *Merchants' Bank v. Hall*, 83 N. Y. Am. St. R. 143; *Brewster v. Hartley*, 37 Calif. 15, 99 Am. D. 237, 22 338, 38 Am. R. 434.
§ 80. *Ball v. Stanley*, 5 Yerg. Am. & Eng. Encyc. of Law, 857, (Tenn.) 199, 26 Am. D. 263;
[26] *Masonic Savings Bank v.*
§ 79. *Third National Bank v. Bangs's Adm'r*, 84 Ky. 135, 4 Am.

2. RIGHTS AND DUTIES OF THE PARTIES.

§ 81. **Custody.**—The first right of the pledgee is exclusive possession of the thing pledged. This right is good against all the world, including the pledgor, and continues not only during the time for which it was pledged, but until the debt is fully satisfied. To vindicate his right the pledgee may maintain replevin against anyone who deprives him of his possession; or he may recover against his pledgor his damages, and against other disseisors trover for the full value of the chattel, holding the surplus beyond his own interests in trust for the pledgor.

§ 82. **Profits and expenses.**—The natural profits of the pledge while retained by the pledgee become part of the pledge security and must be used to reduce the debt. Such are the young of animals, milk from cows, and dividends from stock, if the stock stands in the name of the pledgee.

The expenses, too, reasonably necessary for the proper preservation of the pledge, must be borne by the pledgee, who may, of course, look to the pledgor for reimbursement before the pledged goods can be reclaimed. Profits become part of the pledged property, expenses part of the debt secured.

§ 83. **Right to use.**—The pledgee has no right to use the property pledged to its injury. The old cases allow him such use of it as is not detrimental thereto, but the modern view is that he has no right to use it, further than is needful for its proper care, unless the contract of pledge is such that the owner's consent may be fairly inferred. Wrongful use does not terminate the pledge, but makes the pledgee absolutely liable for any resulting injury to the property.

St. R. 197; *Collins v. Dawley*, 4 16 Am. D. 689; *Plucker v. Teller*, 174
Colo. 138, 34 Am. R. 72; *Merchants'* Pa. St. 529, 34 Atl. R. 208, 52 Am.
Bank v. Hall, 83 N. Y. 338, 38 Am. St. R. 825; [16] *Allen v. Delano*,
R. 434. 55 Me. 113, 92 Am. D. 573.

§ 81. [22] *Hall v. Page*, 4 Ga. § 83. [21] *Stearns v. Marsh*, 4
428, 48 Am. D. 235; *Treadwell v.* Denio (N. Y.) 227, 47 Am. D. 248,
Davis, 34 Calif. 601, 94 Am. D. 770; 22 Am. & Eng. Encyc. of Law 864;
Adams v. O'Connor, 100 Mass. 515, Schouler, *Bailments and Carriers*,
1 Am. R. 137. §§ 211, 212. Compare [1] *Coggs v.*

§ 82. [27] *Houton v. Holliday*, 2 Bernard, 2 Ld. Raymond 909, 1 Sm.
Murph. (N. C.) 111, 5 Am. D. 522; Lead. Cas. 199.
Sellick v. Munson, 2 Aik. (Vt.) 150;

§ 84. Assignment by the pledgee.—The pledge is an incident of the debt and may be assigned with it. The pledgee may sell, assign, or pledge all his interest in the pawn without affecting the security. His assignee or pledgee acquires his title, but no more. The usual exception exists in the case of negotiable instruments taken *bona fide* in the course of trade, and of other property if the pledgor had clothed the pledgee with apparent authority, or with the indicia of ownership.

The assignment of the debt should be accompanied by a transfer of the pledge. If it is not, the assignee will still have an equitable interest in the pledge which he can enforce against all except an innocent holder.

§ 85. —Negotiable instruments.—The pledgee taking negotiable instruments *bona fide* for value as security for a debt, takes them free from equities, like any other transferee, and may acquire a better title than his pledgor. Whether a pledge to secure a pre-existing debt is a transfer for value is in dispute, but the weight of authority is with the rule of the United States Supreme Court to the effect that taking security for a pre-existing debt constitutes the pledgee a holder for value.

The courts that deny this admit that there is value if the pledgee, when taking the negotiable security, gives up any right. Thus, a pledgee is a holder for value if he accepted the securities in payment of a pre-existing debt, or surrendered other securities, or extended the time for payment, or forebore to sue. The fact that one is an accommodation indorser is no defence against the pledgee.

§ 86. —Corporate stock.—Stock certificates are not negotiable instruments. Hence, unless the owner had clothed him with the muniments of title, the pledgor can give his pledgee no better title than he himself had. As to the parties themselves, and others charged with knowledge of the transaction, a pledge by delivery of the stock, accompanied by an assignment and a power of attorney to make the transfer on the books of the corporation, is effectual even where the by-

§ 84. *Bailey v. Colby*, 34 N. H. 29, of *Swift v. Tyson*, 16 Peters (U. S.) 1, and *Bay v. Coddington*, 5 Johns. Ch. (N. Y.) 54, 20 Johns. 637, 66 Am. D. 752; *Homer v. Savings Bank*, 7 Conn. 478.

§ 85. Compare the leading cases

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laws of the corporation require a transfer on its books. But as to the corporation and innocent third persons, transfer on the books is necessary.

§ 87. — **Rights of pledgee.**—The pledgee, under his power of attorney, may compel a transfer to him on the books of the corporation, after which he has the right to vote the stock and collect the dividends, applying them to a reduction of the debt secured. If he appears on the books as owner of the stock, he not only acquires the rights but assumes the liability of a stockholder.

As between the pledgor and pledgee, however, the pledgor is still the general owner, the pledgee has a special property only and upon payment of the debt this is extinguished.

§ 88. — **Bills of lading, warehouse receipts, etc.,** are usually assigned like negotiable instruments by mere indorsement, but are not in other respects negotiable. They are merely representatives of the goods, and when pledged are subject to the same rules that govern the pledge of corporeal chattels. The pledgee, in general, gets no better title than his pledgor.

§ 89. **Care.**—The ordinary care of a mutual benefit bailment has been explained and little need be added here. If the pledge property be choses in action, the duty of the pledgee is not limited to their safe-keeping. He must take all necessary steps at proper times to keep alive and to collect the rights represented by the paper. Thus, in case of promis-

§ 86. *Spreckels v. Nevada Bank*, 100 Am. D. 363; *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. R. 420, 9 Am. St. R. 276, *post* secs. 151, 222 and cases there cited.

§ 87. *Pullman v. Upton*, 96 U. S. 137 U. S. 604, 11 Sup. Ct. 162; *Swift v. Tyson*, 16 Peters (U. S.) 1; *Third National Bank v. Boyd*, 44 Md. 47, 22 Am. R. 35; *Cooper v. Simpson*, 41 Minn. 46, 42 N. W. R. 601, 16 Am. St. R. 667; *Ware v. Squyer*, 81 Minn. 388, 84 N. W. R. 126, 83 Am. St. R. 390, note;

§ 88. *Burton v. Curry*, 40 Ill. 320, 89 Am. D. 350; *Davenport National Bank v. Homeyer*, 45 Mo. 145, 84 Iowa 377, 51 N. W. R. 162, 35 Am. St. R. 313.

wary notes, proper steps must be taken to fix the liability of indorsers and to collect interest and principal when due. And in the case of pledged stocks, bonds, bills of lading, etc., ordinary diligence must be exercised in securing the property and profits represented by such paper. All this is only that care which an ordinarily prudent business man is wont to exercise in the conduct of his own affairs of like kind. Any loss through the negligence of the pledgee may be recouped by the pledgor by way of counterclaim in an action on the debt.

§ 90. **Proceeds of collateral.**—If collateral security be converted into money, the law requires its application on the debt. If there be a surplus it is money had and received to the use of the pledgor and the law implies a promise to pay it over. If the pledgee fails to do so, the pledgor has his choice of suing in assumpsit for the balance or in equity for an accounting.

§ 91. **Conversion by pledgee.**—If there be a wrongful sale or misapplication of the pledged property by the pledgee, the pledgor may sue in assumpsit for the balance in excess of his debt, or he may sue in trover for conversion. If the property has been converted, he need not make demand or tender of the debt before bringing suit.

§ 92. —**The measure of damages** for conversion of the property by the pledgee is the fair market value of the goods less the amount of the debt.

Collateral securities, such as stocks, bonds, etc., which are subject to fluctuating values, present a difficulty, and various rules have been adopted by the courts as to the price at which such securities should be valued in assessing damages for

§ 90. *Hunt v. Nevers*, 15 Pick. Keith, 57 Ill. 451, 11 Am. R. 28, (Mass.) 500, 26 Am. D. 616; *Baker v. Drake*, 53 N. Y. 211, 13 [26] *Masonic Savings Bank v. Am. R. 507*, *Third National Bank v. Boyd*, 44 Md. 47, 22 Am. R. 35, *Dolliff v. Robbins*, 83 Minn. 498, St. R. 197. 86 N. W. R. 772, 85 Am. St. R. 466.

§ 91. [21] *Stearns v. Marsh*, 4 Denio (N. Y.) 227, 47 Am. D. 248.

§ 92. [29] *Wright v. Bank of Metropolis*, 110 N. Y. 237, 18 N. E. R. 79, 6 Am. St. R. 356; [25] *Wilson v. Little*, 2 N. Y. 443, 51 Am. D. 307. See also *Fowle v. Ward*, 113 Mass. 548, 18 Am. R. 534, *Sturges v.*

The Massachusetts and Illinois cases represent the extreme views. The New York case takes the middle ground and, on the whole, furnishes the most equitable rule.

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their conversion. On the whole, it seems just to allow the damages that would naturally be sustained by the owner in restoring himself to his former position, or in other words, replacing the stock.

Accordingly, the rule supported by reason and the weight of authority, is that in an action of trover for a conversion of stocks or bonds, their value is the highest market price of the securities within a reasonable time after the owner learns of their conversion. This covers the natural and proximate loss of the owner, but does not allow him to speculate on the market and delay bringing suit in the hope that the securities may reach a higher figure and so increase the damages he may recover.

§ 93. **The pledgor warrants his title**, or at least, that he has sufficient property to make the pledge. As the pledgee takes, in general, subject to prior liens, the pledgor is liable to him if they defeat the pledge, unless the pledgee took with knowledge of such claims.

§ 94. **Property of the pledgor.**—The general property remains in the pledgor, subject to the pledgee's lien, even after default, and he may assign his interest or sell the goods subject to the lien of the pledge. If the pledge has been delivered to the pledgee, the assignee will, of course, stand in the same position as the pledgor. Execution creditors of the pledgor cannot levy on the pledged property until they have satisfied the pledgee's claims.

3. TERMINATION OF THE PLEDGE.

§ 95. **Classification.**—The pledge relation may be terminated—

A. *By act of the parties.* The pledge may be extinguished by act of—

1. *The pledgor*, either by
 - (1) *Performance of the obligation*, or
 - (2) *Default in performance*.

§ 93. Story, *Bailments & Carriers*, § 354. [30] *Norton v. Baxter*, 41 Minn. 146, 42 N. W. R. 865, 16 Am. St. R.

§ 94. *Brewster v. Hartley*, 37 Calif. 15, 99 Am. D. 237; *Loughborough v. McNevin*, 74 Calif. 250, 14 Pac. R. 369, 5 Am. St. R. 435; 679; [26] *Masonic Savings Bank v. Bangs's Adm'r*, 84 Ky. 135, 4 Am. St. R. 197; [22] *Hall v. Page*, 4 Ga. 428, 48 Am. D. 235.

2. *The pledgee, who may*

(1) *Voluntarily relinquish* the pledge without performance, or

(2) *Forfeit the pledge* by his own wrong.

B. *By operation of law* the destruction of the chattel works an extinction of the pledge relation; but a change in the status of the parties, as by death, marriage, insolvency, will not affect the pledge contract.

A. TERMINATION BY ACT OF THE PARTIES.

1. *By Act of the Pledgor.*

§ 96. (1.) **Full performance** of his obligation by the pledgor is the normal means of terminating the relation. Even readiness to perform is enough; and tender of the debt at or after maturity discharges the lien and makes the pledgee, if he refuses to surrender the pledged property, guilty of conversion. Nor is it necessary to the discharge of the lien, as distinguished from the payment of the debt, that the tender be kept good, or that the money be paid into court. The wrongful refusal to accept payment and deliver the chattel is conversion and makes the pledgee absolutely liable.

§ 97. (2.) **Default of the pledgor** in performance of the obligation at its maturity gives the pledgee the right to consider the pledge as terminated at once and to proceed to his remedies. He may, however, treat the contract as still in force and retain the pledge until the debt is paid, the relation of the parties to each other and to the pledge continuing as before default. Indeed, in the absence of an agreement to sell, the pledgor has no right to complain if the pledgee refuses to do so. But if securities are likely to perish or seriously shrink in value, a sale may be compelled by bill in equity.

§ 98. — **Remedies of the pledgee.**—Upon default the pledged chattel is still a mere security, and does not become

§ 96. [30] *Norton v. Baxter*, 41 11 Iowa 410, 79 Am. D. 497; Minn. 146, 42 N. W. R. 865, 16 Am. Schouler, *Bailments & Carriers*, St. R. 679; *Loughborough v. Mc-* § 244.

Nevin, 14 Calif. 250, 14 Pac. R. 369, § 98. [31] *Robinson v. Hurley*, 5 Am. St. R. 435; *Ball v. Stanley*, 11 Iowa 410, 79 Am. D. 497; *Luck-* 5 Yerg. (Tenn.) 199, 26 Am. D. 263. *etts v. Townsend*, 3 Tex. 119, 49 Am.

§ 97. [31] *Robinson v. Hurley*, D. 723.

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the property of the pledgee. To realize on his debt he may—

- a. Sue upon the debt.
- b. Exercise his power of sale by—
 - (a) A sale at common law,
 - (b) A proceeding in equity,
 - (c) A special power given in the pledge contract, or
 - (d) A statutory sale.

§ 99. —**Suit on the debt.**—The pledgee is not compelled to rely on the security of his pledge. He may, without losing his lien, sue the pledgor personally on the debt. The pledge security continues until he has obtained not only judgment but satisfaction on the debt.

§ 100. —**(a) Sale at common law.**—After default of the pledgor, the pledgee may demand payment, and upon failure of the debtor to comply, sell the goods at public sale after reasonable notice to the debtor of the time and place of sale. The purpose of the notice is to enable the pledgor to see that the sale is fairly conducted and to find bidders to enhance the price. If he knows of the sale therefore it is enough, though if the pledgee fails to give such notice he assumes the burden of showing actual knowledge by the pledgor. If the pledgor cannot be found there must be a judicial sentence to warrant the sale.

The public sale must be conducted with perfect fairness and the pledgee cannot himself, either directly or indirectly, be the purchaser. If he buys the sale is voidable, and the pledgor may treat the pledge contract as still in force.

§ 101. —**Choses in action.**—The law requires a public sale to insure the best terms for the pledgor. But such sale of stocks, bonds, notes and the like might result in large sacri-

§ 99. [31] Robinson v. Hurley, D. 721, 723; [22] Hall v. Page, 4 11 Iowa 410, 79 Am. D. 497; Wallace v. Finnegan, 14 Mich. 170, 90 Am. D. 243. Note to 73 Am. St. R. 567; Fisher v. Fisher, 98 Mass. 303; Ehrlich v. Ewald, 66 Cal. 97, 4 Pac. R. 1062.

§ 100. [31] Robinson v. Hurley, 11 Iowa 410, 79 Am. D. 497; [21] Stearns v. Marsh, 4 Denio (N. Y.) 227, 47 Am. D. 248; Lucketts v Townsend, 3 Texas 119, 49 Am.

D. 721, 723; [22] Hall v. Page, 4 Ga. 428, 48 Am. D. 235; [32] Maryland Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. D. 779; Whitlock v. Heard, 13 Ala. 776, 48 Am. D. 73; Jeanes's Appeal, 116 Pa. St. 573, 11 Atl. R. 862, 2 Am. St. R. 624.

§ 101. [32] Maryland Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. D. 779; White v. Phelps, 14 Minn. 27, 100 Am. D. 190; Hunt v. Nevers, 15 Pick. (Mass.) 500, 26 Am. D. 616.

fice of value. Accordingly, by the better opinion it is held that in the case of stocks and bonds a sale after notice on the stock exchange according to the custom of brokers is the proper procedure. Negotiable notes should be held till maturity and collected, unless they can be sold for full value.

§ 102. —(b) **Sale in equity.**—Sale by proceeding in equity under a decree of foreclosure is cumbersome, and should be resorted to only when there are conflicting claims, where title is doubtful, or where notice can not be given to the pledgor. The pledgee is not entitled to go into equity if he has an adequate remedy at law.

§ 103. —(c) **Special contract.**—The parties may agree in the pledge contract on the method of sale in case of default. Such stipulations, if not unconscionable and oppressive, will govern. Thus, it may be agreed that the sale shall be private, that demand and notice shall be waived, that the property may be purchased by the pledgee; but not that the pledge shall become irredeemable.

§ 104. —(d) **Statutory sale.**—In many of the states sale of the pledge upon default of the pledgor is regulated by statute. This is sometimes an additional remedy, and in some cases abrogates the right of sale at the common law.

§ 105. —**Equitable principles govern.**—The principles applied in sale by any of the means mentioned are founded in equity and the rights of the pledgor are always safeguarded. If the pledge is divisible only so much may be sold as will satisfy the debt. The pledgee is bound to proceed so as to realize as much as possible for the pledgor and to turn over to him any excess remaining after the debt is satisfied.

- § 102. [23] *American Pig Iron, etc., Co. v. German*, 126 Ala. 194, 28 So. R. 603, 85 Am. St. R. 21; [21] *Stearns v. Marsh*, 4 Denio (N. Y.) 227, 47 Am. D. 248; *Lucketts v. Townsend*, 3 Tex. 119, 49 Am. D. 723; [22] *Hall v. Page*, 4 Ga. 428, 48 Am. D. 235; [31] *Robinson v. Hurley*, 11 Iowa 410, 79 Am. D. 497.
- § 103. *Lucketts v. Townsend*, 3 Tex. 119, 49 Am. D. 723; *Cooper v. Simpson*, 41 Minn. 46; 16 Am. St. R. 667; [32] *Maryland Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. D. 779; [31] *Robinson v. Hurley*, 11 Iowa 410, 79 Am. D. 497; *Jeanes's Appeal*, 116 Pa. St. 573, 11 Atl. R. 862, 2 Am. St. R. 624.
- § 105. [26] *Masonic Savings Bank v. Bangs's Adm'r*, 84 Ky. 135, 4 Am. St. R. 197; [44] *Whitlock v. Heard*, 13 Ala. 776, 48 Am. D. 73; [32] *Maryland Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. D. 779.

§ 106. — **Equity of redemption.**—The pledgor's right to redeem the pledge by performance of the obligation can be defeated only by actual sale after default. It has been said that he has his lifetime in which to redeem, but the better rule denies him the privilege of sleeping on his rights until his demand becomes stale. A stipulation in the pledge contract depriving the pledgor of his equity of redemption is void as against public policy. If the statute of limitations has run against the debt the pledgor must nevertheless pay the debt to redeem the pledge.

2. *By Act of the Pledgee.*

§ 107. (1.) **Termination by consent of the pledgee.**—The pledgee may, of course, consent to yield his security at any time. He may voluntarily surrender possession of the pledge before payment of the debt, take other security in lieu of the former, or waive or release his rights. A release of the debt, of course, operates as a release of the pledge, but not the mere taking of new security, nor the substitution of a new note for the debt unless such was the intention of the parties.

§ 108. (2.) **Wrong of the pledgee.**—Any wrong of the pledgee resulting in injury to the pledge, or in its conversion, operates at once as a termination of the pledge if the pledgor so chooses. And the destruction of the thing itself, of course, extinguishes the pledge.

§ 109. **Redelivery.**—Possession by the pledgee is essential to the life of a pledge. Redelivery at any time to the pledgor,

§ 106. *Lucketts v. Townsend*, 3 Tex. 119, 49 Am. D. 723, note; [25] *Wilson v. Little*, 2 N. Y. 443, 51 Am. D. 307; [21] *Stearns v. Marsh*, 4 Denio (N. Y.) 227, 47 Am. D. 248; *Gilmer v. Morris*, 80 Ala. 78, 60 Am. R. 85. But compare *Wright v. Ross*, 36 Calif. 414 and *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

§ 108. [44] *Whitlock v. Heard*, 13 Ala. 776, 48 Am. D. 73.

§ 109. [23] *American Pig Iron, etc., Co., v. German*, 126 Ala. 194, 28 So. R. 603, 85 Am. St. R. 21; [26] *Masonic Savings Bank v. Bangs's Adm'r*, 84 Ky. 135, 4 Am. St. R. 197; [25] *Wilson v. Little*, 2 N. Y. 443, 51 Am. D. 307; [21] *Stearns v. Marsh*, 4 Denio (N. Y.) 227, 47 Am. D. 248; [27] *Houghton v. Holliday*, 2 Murph. (N. C.) 111, 5 Am. D. 522; [16] *Allen v. Schouler*, *Bailments & Carriers*, Delano, 55 Me. 113, 92 Am. D. 573.

§ 107. *Treadwell v. Davis*, 34 Calif. 601, 94 Am. D. 770; *Story*, *Bailments & Carriers*, § 360, 365; *Schouler*, *Bailments & Carriers*, § 263.

save for some temporary purpose such as leaving a chattel with the owner for repair, at once puts an end to the pledge, but a wrongful taking by the pledgor does not affect the pledgee's right.

When by any of the means mentioned the pledge relation is terminated, it becomes the duty of the pledgee to return the identical thing pledged in as good condition as when it was received save for such wear and deterioration as can not be charged to lack of ordinary care on the part of the pledgee. And with the thing should be returned any interest, rent, profit, or increase from the thing while in the pledgee's hands. The pledgor is entitled to the return of his chattel and all increments added during the pledge relation.

B. LOCATIO, OR HIRING.

CHAPTER VII.

OF LOCATIO REI.

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| § 110. Definition of <i>locatio</i> bailments. | § 117. —Trover for conversion. |
| 111. Distinctions. | 118. ———Contract void or avoidable. |
| 1. <i>Nature of the relation.</i> | 119. —Other actions. |
| 112. The essentials. | 120. Assignment by bailee. |
| 2. <i>Rights and duties of the parties.</i> | 121. Bailee and third persons. |
| 113. Title and enjoyment. | 122. Compensation. |
| 114. Expenses. | 123. —Contract incomplete. |
| 115. Right to use. | 3. <i>Termination of the relation.</i> |
| 116. —Conversion. | 124. Duty of the bailee. |

§ 110. **Definition.**—A *locatio*, or hiring, is a bailment of a chattel for a reward. It includēs (§ 64): 1. *Locatio rei*, in which the bailment purpose is the use of a thing, and 2. *Locatio operis*, in which the bailment purpose is service about the thing. Of these in their turn.

§ 111. **Distinctions.**—*Locatio rei* is the hired use of a thing. There is no English word that applies precisely to this bailment. Hiring and letting include not only the *locatio* bailments but also the hiring and letting of personal services and of real estate, which, of course, are not bailments. The *locatio* bailment involves the *letting* of a chattel by the bailor, or *letter*, and the hiring of that chattel by the bailee, or *hirer*.

1. NATURE OF THE RELATION.

§ 112. **The essentials** of this relation are, (a) a chattel to be hired, (b) a contract of hire, and (c) a recompense.

(a) Any chattel, corporeal or incorporeal, which is not

§ 112. See Chapters 1, 2, 5.

consumed in the use, may be hired. A very large proportion of the cases arise out of the hire of horses.

(b) The general principles of bailment contracts apply to contracts of hire and need not be here restated.

(c) Compensation, which is the essential element of all mutual benefit bailments, in *locatio rei* bailments is usually money, but it may be goods, services or any substantial benefit. It may be agreed upon or merely presumed from the contract of hiring; and, in general, the law favors the presumption that the use of another's chattel is a use for hire.

2. RIGHTS AND DUTIES OF THE PARTIES.

§ 113. **Title and enjoyment.**—A bailor warrants that he has title sufficient for the purpose of the letting and has been said to warrant the thing as fit for the use to which it is to be put. Modern cases excuse the letter for defects which are not known to him, and could not have been discovered by the exercise of due care. This is the more true if the defects were equally known by the hirer.

§ 114. **Expenses** in putting the hired chattel in proper condition for use and keeping it so are chargeable to the letter, as are extraordinary expenses reasonably incurred in preserving the chattel from injury due to unexpected causes for which the hirer was not at fault. But the letter is not bound to provide against ordinary wear and tear from the use, nor furnish the ordinary keep of hired animals. Custom and the nature of the contract of hire usually determine who should bear expenses.

§ 115. **Right to use.**—Use of the hired chattel is the very purpose of this bailment. The first right of the hirer, there-

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| <p>§ 113. <i>Lynch v. Richardson</i>, 163 Mass. 160, 39 N. E. R. 801, 47 Am. St. R. 444; <i>Copeland v. Draper</i>, 157 Mass. 558, 32 N. E. R. 944, 34 Am. St. R. 314; <i>Hadley v. Cross</i>, 34 Vt. 586, 80 Am. D. 699; <i>Nye v. Iowa City Alcohol Works</i>, 51 Iowa 129, 50 N. W. R. 988, 33 Am. R. 121; <i>Higman v. Camody</i>, 112 Ala. 267, 20 So. R. 480, 57 Am. St. R. 33; [11] <i>Leach v. French</i>, 69 Me. 389, 31 Am. R. 296.</p> | <p>§ 114. [11] <i>Leach v. French</i>, 69 Me. 389, 31 Am. R. 296; <i>Harrington v. Snyder</i>, 3 Barb. (N. Y.) 380.</p> <p>§ 115. <i>Woodman v. Hubbard</i>, 25 N. H. 67, 57 Am. D. 310, [33] <i>Cobb v. Wallace</i>, 5 Cold. (Tenn.) 539, 98 Am. D. 435; <i>McConnell v. Maxwell</i>, 3 Black. (Ind.) 419, 26 Am. D. 428; <i>Banfield v. Whipple</i>, 10 Allen (Mass.) 27, 87 Am. D. 618; <i>Story, Bailments and Carriers</i>, §§ 395, 396; <i>Beach v. Railroad</i>, 37 N. Y. 457.</p> |
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fore, is the right to "the exclusive use and control of the hired thing during the period of hire," and this right he may defend against all the world including the letter.

But this use is limited to the purpose of hiring; using the thing for another purpose is conversion. The manner and extent of the use, too, must conform to the terms, expressed or implied, of the bailment contract. Any departure by the hirer, or his servants in the course of their employment, makes the hirer absolutely liable for injuries to the chattel.

§ 116. — **Conversion.**—The departure from the contract may amount to conversion of the property, or it may be merely a trespass. What acts amount to a conversion is often far from clear. Not every wrongful dealing with another's chattel is a conversion. But "acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even though the defendant may have honestly mistaken his rights;" and so does any other act done with intent to deprive the owner of his property, permanently or temporarily. And a neglect or refusal to deliver property when demanded is evidence of conversion, because these acts are evidence that the defendant in withholding it claims the right to, which is a claim of a right to dominion over it.

Many cases hold that intentionally driving a horse beyond the point for which he was hired, or in a different direction, or keeping it beyond the time, will constitute conversion. The rule is often a harsh one and some recent cases have taken the ground that such an act was not necessarily of itself conversion.

§ 117. — **Trover for conversion.**—Upon conversion by the

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| <p>§ 116. [34] Spooner v. Manchester, 133 Mass. 270, 43 Am. R. 514; [12] Wentworth v. McDuffie, 48 N. H. 402; Woodman v. Hubbard, 25 N. H. 67, 57 Am. D. 310; [33] Cobb v. Wallace, 5 Cold. (Tenn.) 539, 98 Am. D. 435; Eastman v. Sanborn, 3 Allen (Mass.) 594, 81 Am. D. 677; Irish v. Cloyes, 8 Vt. 30, 30 Am. D. 446. But see Doolittle v. Shaw, 92 Iowa 348, 60 N. W. R. 621, 54 Am. St. R. 562.</p> | <p>§ 117. Hart v. Skinner, 16 Vt. 138, 42 Am. D. 500; Woodman v. Hubbard, 25 N. H. 67, 57 Am. D. 310; [33] Cobb v. Wallace, 5 Cold. (Tenn.) 539, 98 Am. D. 435; [34] Spooner v. Manchester, 133 Mass. 270, 43 Am. R. 514; Rotch v. Hawes, 12 Pick. (Mass.) 136, 22 Am. D. 414. But compare Farkas v. Powell, 86 Ga. 800, 13 S. E. R. 200; Harvey v. Epes, 12 Gratt. (Va.) 153.</p> |
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hirer, the letter acquires a vested right of which he can not be deprived without his consent. Return to the terms of the contract will not avail the bailee. The bailor may treat the act as practically a sale and sue in trover for the full value of the property.

The letter is not compelled to receive back converted property, but if he does, this is not of itself waiver of his right. It merely lessens the damages he can recover by the value of the chattel as it was returned.

§ 118. —**Contract void or voidable.**—It affords the bailee no excuse that the contract was a *Sunday contract* and therefore void. The action is not on the contract but for the tortious dealing with chattels not belonging to him in a manner inconsistent with the rights of the true owner, and it is unnecessary to set up the contract in order to show the right of action. The defendant must set up the illegal contract to show his excuse and this he is not allowed to do. Neither party can rely on an illegal contract to prevail in his suit. For the same reason *infancy* is no defence to an action for conversion. The infant is liable for his torts.

Neither is it a defence that the loss would have occurred if there had been no conversion, nor that the hirer was guilty of no neglect. Upon conversion the property is practically his and at his risk.

§ 119. —**Other actions.**—The bailor, in any case where loss is due to want of ordinary care on the part of the bailee, or to his failure to keep within the terms of the bailment, may bring action of trespass or case and recover for any loss suffered even to the full value of the thing if it has been destroyed. These principles prevail as well in code states where distinctions between actions founded upon tort have been abolished. Under the single civil action of the code the same recovery may be had as under the various common law actions before mentioned.

§ 118. *Stewart v. Davis*, 31 Ark. 518, 25 Am. R. 576; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. R. 30; *Ray v. Tubbs*, 50 Vt. 688, 28 Am. R. 519; *Towne v. Wiley*, 23 Vt. 355, 56*Am. D. 85; [35] *Davis v. Garrett*, 6 Bing. 716.

§ 119. *Crocker v. Gullifer*, 44 Me. 491, 69 Am. D. 118; *Rotch v. Hawes*, 12 Pick. (Mass.) 136, 22 Am. D. 414; *Stewart v. Davis*, 31 Ark. 518, 25 Am. R. 576.

§ 120. **Assignment by bailee.**—Any attempt by the bailee, without the consent of the bailor, to sell or pledge the hired chattel amounts to its conversion; but where the hiring is not personal and is for a definite term the bailee may, in general, assign his beneficial interest, and the assignee will secure all the rights of his assignor. The bailee, however, remains liable to the owner for any loss due to the neglect of the bailee's assignee or servants. This has been put on the ground of want of privity between the bailor and subusers of the bailee, but it is more satisfactorily explained on the principles of agency or of master and servant. The assignee is treated as a sub-agent or servant of the bailee for whose acts he is, in general, responsible.

§ 121. **Bailee and third persons.**—The hirer has a special property in the thing hired, and for the time stands to strangers in the relation of owner. For any injury from the hired chattel to third persons due to the neglect of the bailee or his servants he, and not the bailor, is liable. And during the continuance of the term he, and not the bailor, may bring an action against a third person for injury to the thing, recovering pay to the full value of the chattel if it be destroyed by such wrong of the third person. This right rests both on the hirer's right to the use of the thing and the fact that he is answerable over to the general owner. In bailments for an indefinite term, and in case of injuries that permanently impair the chattel, the bailor also has his action against third persons.

§ 122. **Compensation** to the promisor is the characteristic feature of all mutual benefit bailments. In *locatio rei* bailments the hirer is bound to pay the letter for the use of the thing at the contract price, if there be one. If no price has been fixed, then the customary price is implied; or in the ab-

§ 120. *Bailey v. Colby*, 34 N. H. 29, 66 Am. D. 752; *Sanborn v. Colman*, 6 N. H. 14, 23 Am. D. 703; *Swift v. Moseley*, 10 Vt. 208, 33 Am. D. 197; *McKenzie v. Nevius*, 22 Me. 138, 38 Am. D. 291; *Schouler, Bailments & Carriers*, § 145. But see *Baird v. Daly*, 57 N. Y. 236, 15 Am. R. 488; *Dunlap v. Gleason*, 16 Mich. 158, 93 Am. D. 231.

§ 121. [14] *Little v. Fossett*, 34 Me. 545, 56 Am. D. 671; [47] *American District Tel. Co. v. Walker*, 72 Md. 454, 20 Atl. R. 1, 20 Am. St. R. 479; *Strong v. Adams*, 30 Vt. 221, 73 Am. D. 305; *McConnell v. Maxwell*, 3 Black. (Ind.) 419, 26 Am. D. 428; *Brewster v. Warner*, 136 Mass. 57, 49 Am. R. 5.

sence of a custom a reasonable compensation must be paid. What is reasonable is a question of fact to be determined from the circumstances of the hiring.

§ 123. —**Contract incomplete.**—If the hiring was for a fixed term and the chattel was destroyed or rendered unfit for use without the fault of either party, the hirer, if the contract is divisible, must pay for the use had *pro tanto* and has no claim for damages against the letter. If the bailee, however, was at fault he must pay the full price less any amount the letter may be able to secure from the hire of the thing to others during the term; but if the fault is chargeable to the letter, and the contract divisible, the bailee must pay for the use *pro tanto* and may recoup any damages he has suffered. If the contract was entire, it has been held that the bailee must pay all or nothing, depending upon the conditions under which complete fulfillment became impossible. But the better rule is that for any beneficial services received the bailee should pay its reasonable worth, deducting any damages he may have suffered through the fault of the bailor.

3. TERMINATION OF THE RELATION.

§ 124. **The duty of the bailee.**—The relation may be terminated under various conditions, as stated in § 24 and the following. When the bailee has had the use according to the terms of the contract, it becomes his duty to redeliver the chattel and to pay the proper compensation. These duties may, of course, be modified by stipulations made in the contract of hire.

§ 123. Story, Bailments & Carriers, §§ 416, 417 a; Schouler, Bailments & Carriers, §§ 160, 161. Cold. (Tenn.) 539, 98 Am. D. 435; Sanborn v. Colman, 6 N. H. 14, 23 Am. D. 703.

§ 124. [33] Cobb v. Wallace, 5

CHAPTER VIII.

OF LOCATIO OPERIS.

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| <p>§ 125. Distinctions.</p> <p>126. General principles apply.</p> <p style="padding-left: 20px;">1. <i>Nature of the relation.</i></p> <p>127. The essentials.</p> <p>128. Accession.</p> <p style="padding-left: 20px;">2. <i>Rights and duties of the parties.</i></p> <p>129. Compensation.</p> <p style="padding-left: 20px;">a. <i>Service completed.</i></p> <p>130. (1) According to contract.</p> <p>131. (2) Not according to contract.</p> <p style="padding-left: 20px;">b. <i>Work left incomplete.</i></p> <p>132. (1) Destruction of the thing.</p> <p>133. (2) Fault of bailor.</p> <p>134. (3) Fault of bailee.</p> <p>135. Lien.</p> <p>136. —Who can give a lien.</p> <p>137. —Basis of the lien.</p> <p>138. —Does not extend to agisters and liverymen.</p> <p>139. —Statutory extensions.</p> <p>140. —Kinds of lien.</p> <p>141. —How regarded.</p> | <p>§ 142. —Extent of the lien.</p> <p>143. —Enforcement of lien.</p> <p>144. —Waiver of lien.</p> <p>145. —Termination of lien.</p> <p>146. Property rights of bailor and bailee.</p> <p>147. Care.</p> <p>148. Special <i>locatio custodiae</i> bailments.</p> <p style="padding-left: 20px;"><i>Warehousemen, elevator owners, cold storage companies.</i></p> <p>149. Warehousemen, etc.</p> <p>150. —Effect of usage.</p> <p>151. —Warehouse receipts.</p> <p>152. —Confusion of goods.</p> <p>153. —Care.</p> <p>154. —Lien.</p> <p>155. —Duration of the relation.</p> <p style="padding-left: 20px;"><i>Other special bailees for hire.</i></p> <p>156. Wharfingers.</p> <p>157. Factors or commission merchants.</p> <p>158. Safe-deposit companies.</p> <p>159. Agisters and liverymen.</p> |
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§ 125. **Distinctions.**—The second of the *locatio bailments* is *locatio operis* or the bailment of a chattel for the performance of services upon it for a reward. As before noticed (§ 64), *locatio operis* bailments are ordinary or extraordinary, and of the ordinary three classes have been made according to the nature of the services to be performed—

- (1) *Locatio custodiae*, the hired custody of a thing,
- (2) *Locatio operis faciendi*, the hire of work and labor upon a thing, and

(3) *Locatio operis mercium vehendarum*, the hired carriage of a thing.

Reserving the extraordinary bailments for separate treatment, we shall consider the rules of law relating to the familiar relations of bailors: (1) to warehousemen, wharfingers, safe-deposit companies, factors and bailiffs (agisters); (2) to artisans employed to manufacture chattels from materials furnished, or to repair chattels; (3) to private carriers of goods. For the most part these will be treated together. But brief special consideration will be needed, and this will be given after the consideration of the general principles of *locatio operis* bailments.

§ 126. **General principles apply.**—It should be borne in mind that, by a few changes of terms and phrases because of the different bailment purposes, nearly all that was said in the discussion of *locatio rei* bailments equally applies here. By special contract the relations of the parties may be modified to any extent not forbidden by public policy. The remaining chapters of the subject will be concerned largely in applying to specific cases the general principles already stated, but it is precisely this application that causes all bailment litigation, and that forms the substance of every new decision.

1. NATURE OF THE RELATION.

§ 127. **The essentials** of every *locatio operis* bailment are: (a) ~~services to be performed upon the chattel~~, (b) a contract for such services, and (c) a price or reward. It is the *services about the chattel* and the *compensation to the bailee* that are distinctive of this bailment and mark it off from all the others. The contract for services, as a contract, does not differ from contracts in general.

§ 128. **Accession.**—If in the performance of the service the bailee adds materials to the chattel, and before his service is completed the chattel is destroyed, it becomes important to determine upon whom the loss of the materials must fall. It is the rule, on the doctrine of accession, that the materials and labor become part of the chattel; and this is so even though the materials exceed in value the chattel itself. So, too, if the

§ 128. *Pulcifer v. Page*, 32 Me. Snell, 140 N. Y. 193, 35 N. E. R. 404, 54 Am. D. 582, note; *Mack v.* 493, 37 Am. St. R. 534.

bailor furnishes the raw materials, his title follows them up to the finished product, the increased value from the labor being added by accession. But if the workman himself furnishes the materials for making a chattel there is no bailment but an agreement for a sale. Until the chattel is completed and delivered to the vendee, the title remains in the workman.

2. RIGHTS AND DUTIES OF THE PARTIES.

§ 129. **Compensation.**—It is the distinctive feature of *locatio operis* bailments that the *bailee* receives a recompense. The usual rules as to this compensation have been before stated. But when one has been employed to perform work and labor upon a chattel, and for some cause the performance is interrupted before the contract is fully executed, special questions arise. It may be that—

- a. The work was fully completed
 - (1) According to the contract,
 - (2) Not according to the mutual intent,
- b. The work is left incomplete because of
 - (1) Destruction of the thing without the fault of the bailee,
 - (2) The fault of the bailor in preventing the service,
 - (3) The fault of the bailee in abandoning the work.

a. Service Completed.

§ 130. (1) **According to contract.**—If the bailment contract is fully executed, the bailee, of course, is entitled to his hire according to the agreement. But it may be that after the work on the chattel was completed, the thing was destroyed without the fault of either party. In accordance with the doctrine of accession, the chattel and all that has been added to it belong to the bailor, and he must bear the loss. The workman can recover for his labor and materials. *Res perit domino*.

However, the workman may have taken the work by the job. The contract is entire, and he can recover only when he

§ 130. Central Lithographing, Millan v. Vanderlip, 12 Johns. (N. etc., Co. v. Moore, 75 Wis. 170, 43 Y.) 165, 7 Am. D. 299; McConihe N. W. R. 1124, 17 Am. St. R. 186; v. R. R., 20 N. Y. 495, 75 Am. D. [36] Sickels v. Pattison, 14 Wend. 420. (N. Y.) 257, 28 Am. D. 527; Mc-

has fully performed. The thing perishes to the employer, the work to the mechanic. So, too, if he furnishes all the materials, the workman is the owner and *res perit domino*, the employer is not liable.

§ 131. (2) **Not according to the contract.**—If the service is completed, but not according to the mutual intent of the parties, the bailee may still recover on a *quantum meruit*. If the deviation was due to the fault of the bailor, or with his consent, the bailee is entitled to the reasonable worth of his services. But if the bailee was at fault, the bailor may recoup any damages caused by the deviation from the contract. If the service was of no benefit, or if the damages equal or exceed the advantages, there can be no recovery. But for any excess of the benefit over the loss, the bailee is entitled to his reward.

The same principles apply to services not completed within the stipulated time. The bailee is liable to the bailor for losses due to the delay. No compensation can be recovered for extra services or for more valuable materials furnished without the acquiescence of the bailor.

b. Work Left Incomplete.

§ 132. (1) **Destruction of the thing.**—According to the principles before stated, if the thing perish before completion without the fault of either party, the laborer is entitled to compensation *pro tanto* for labor and materials already expended. *Res perit domino.* ✓

Under an entire contract there can be no recovery by a workman who, for any cause, leaves the work incomplete. The tendency of the courts, however, is in favor of relaxing the strictness of the early cases, and allowing one who has performed a beneficial service compensation at least in so far as the benefit of the service exceeds the detriment. There is also a tendency to interpret contracts of service as divisible rather than entire where the terms and conditions admit of such interpretation. As is always the case when rules of law are under process of modification, the cases at present are in hopeless conflict.

§ 131. Taft v. Montague, 14 Mass. Am. D. 527. Compare Britton v. 282, 7 Am. D. 215; [36] Sickels v. Turner, 6 N. H. 481, 26 Am. D. 713, Pattison, 14 Wend. (N. Y.) 257, 28 note.

§ 133. (2) **Fault of bailor.**—If the fault of the bailor prevents the completion of the services, the bailee, according to the principles of agency, may recover for the services rendered and for any loss naturally resulting from the bailor's wrong.

§ 134. (3) **Fault of bailee.**—If the bailee abandons the work, even according to some authorities wilfully and maliciously, some cases allow him to recover the worth of services actually rendered less all loss caused to the bailor by the abandonment of the service. If, on the whole, the service is beneficial, it must be paid for. Other cases hold that this rule applies only when the abandonment was involuntary, and many still adhere to the strict rule denying him any recovery.

§ 135. **Lien.**—Not only is the bailee entitled to compensation for his services upon a chattel, but the law now gives to practically every bailee who has performed such services a security for his wages in a lien on the chattel. A *lien* is the right to retain possession of another's property until satisfaction is secured for some charge thereon.

A lien, at common law, is founded upon possession, actual or constructive; this must be uninterrupted while the lien exists; except in the case of fraud or mistake, a lien once lost can not be restored by resumption of possession. It is not assignable, for as soon as the possession essential to a lien is surrendered to the assignee, the assignor loses his lien and has nothing to assign.

§ 136. **Who can give a lien.**—"A lien is a proprietary interest, a qualified ownership, and in general can only be created by the owner or by some person by him authorized." Neither a thief, nor a bailee, unless authorized or clothed with the

§ 133. Story, Bailments & Carriers, § 441; Schouler, Bailments & Carriers, § 111. 599, 33 Am. R. 809; Miller v. Marston, 35 Me. 153, 56 Am. D. 694.

§ 134. Hillyard v. Crabtree's Adm'r, 11 Tex. 264, 62 Am. D. 475. Compare Steeples v. Newton, 7 Oreg. 110, 33 Am. R. 705, and Britton v. Turner, 6 N. H. 481, 26 Am. D. 713. See also 2 Kent's Commentaries, 591. § 136. [38] Small v. Robinson, 69 Me. 425, 31 Am. R. 299; Sargent v. Usher, 55 N. H. 287, 20 Am. R. 208; [39] Williams v. Allsup, 10 C. B. (N. S.) 417, 100 E. C. L. 417; Watts v. Sweeney, 127 Ind. 116, 26 N. E. R. 680, 22 Am. St. R. 615; Hale v. Barrett, 26 Ill. 195, 79 Am. D. 367; McKenzie v. Nevius, 22 Me. 138, 38 Am. D. 291.

§ 135. [37] Sensenbrenner v. Matthews, 48 Wis. 250, 3 N. W. R. 54

indicia of ownership or authority by the owner, can create a lien on goods not his own.

But where one is entrusted with property for safekeeping or use and hires repairs necessary to its preservation or utility, the owner's consent to such employment is presumed and the mechanic has a lien for his services. A lien for services created by one who had a right to subject the property to it is prior to all other claims against the property.

§ 137. — **Basis of the lien.**—The right of lien originated in cases where the party was bound by law to receive goods, such as innkeepers and common carriers; it was later extended so that every bailee for hire who by his labor and skill had enhanced the value of the goods had a lien upon them for his compensation. Still later, on principle the lien was extended to the warehouseman to secure his storage; and now, it has been said, "the lien is given by the common law to anyone who takes property in the way of his trade or occupation to bestow labor and expense upon it," whether the remuneration is fixed by an agreement or by an implied contract to pay a reasonable price. The law considers the laborer worthy of his hire and secures it to him by allowing him to retain the goods upon which he has expended time and labor until he has received his reward. "The lien rests on principles of natural equity and commercial necessity."

§ 138. — **Agisters, liverymen.**—The lien does not extend to agisters and livery stable keepers for the reason that they do not impart additional value to the animals. A liveryman who takes a horse to breed or train does enhance his value and accordingly has a lien for such services and for the board of the horse during the time. This reason for denying agisters and liverymen a lien is unsatisfactory, for no more do warehousemen add to the value, but it is a more serious objection

§ 137. [40] Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. D. 663; [41] Burdick v. Murray, 3 Vt. 302, 21 Am. D. 588; [42] Steinman v. Wilkins, 7 Watts & S. (Pa.) 466, 42 Am. D. 254; Mathias v. Sellers, 86 Pa. St. 486, 27 Am. R. 723; Arians v. Brickley, 65 Wis. 26, 26 N. W. R. 188, 56 Am. R. 611.

§ 138. [40] Grinnell v. Cook, 3 Hill (N. Y.) 485, 38 Am. D. 663; Jackson v. Cummins, 5 Mees. and W. 341; Miller v. Marston, 35 Me. 153, 56 Am. D. 694; Lord v. Jones, 24 Me. 439, 41 Am. D. 391; Harris v. Woodruff, 124 Mass. 205, 26 Am. R. 658.

that the liverymon does not have that uninterrupted possession of the animals that is essential to the life of a lien. By special contract the right of lien may be reserved to agisters and liverymen.

§ 139. — **By statute** the lien has been very generally extended to agisters and liverymen, and every bailee who performs services upon a chattel for hire has now a lien for his compensation.

§ 140. — **Kinds of lien.**—Liens are *general or special*. A *general lien* is security for the payment of a general balance of account growing out of a series of transactions of a particular kind. It does not extend to debts arising in a different kind of transaction.

A *special lien* is security for services performed in relation to the particular property to which it attaches.

§ 141. — **How regarded.**—*General liens* "are discountenanced by the courts as encroachments on the common law," except those "fastened on the law merchant by inveterate usage." Such are the liens of factors, insurance brokers, bankers and wharfingers.

A ~~special or~~ *particular lien* has been pronounced so just between debtor and creditor that it can not be too much favored. "It is founded upon the principles of natural justice and tends to the security and encouragement of commerce."

§ 142. — **Extent of the lien.**—The lien extends to the whole and every part of the goods to secure the whole and every part of the debt. If several articles are delivered under one contract, each is security not only for its portion of the cost but for the services expended on all the rest. A release

§ 139. Sargent v. Usher, 55 N. H. 287, 20 Am. R. 208; Lambert v. Nicklass, 45 W. Va. 527, 72 Am. St. R. 828.

§ 141. [42] Steinman v. Wilkins, 7 Watts & S. (Pa.) 466, 42 Am. D. 254; McIntyre v. Carver, 2 Watts & S. (Pa.) 392, 37 Am. D. 519; McKenzie v. Nevius, 22 Me. 138, 38 Am. D. 291; [26] Masonic Savings Bank v. Bangs's Adm'r, 84 Ky. 135, 4 Am. St. R. 197.

§ 142. [43] Schmidt v. Blood, 9 Wend. (N. Y.) 268, 24 Am. D. 143; New Haven and Northampton Co. v. Campbell, 128 Mass. 104, 35 Am. R. 360; [42] Steinman v. Wilkins, 7 Watts & S. (Pa.) 466, 42 Am. D. 254; Hensel v. Noble, 95 Pa. St. 345, 40 Am. R. 659; Hale v. Barrett, 26 Ill. 195, 79 Am. D. 367; [46] Potts v. N. Y. and N. E. Railroad Co., 131 Mass. 455, 41 Am. R. 247.

of part of the goods does not release the lien *pro tanto*, but the lien for the whole debt attaches to the goods not released. On the other hand, payment of part of the debt will not release the goods *pro tanto*, but the bailee may keep all the goods till the full debt is paid.

§ 143. — **Enforcement of lien.**—At common law the lienholder had but a mere right to retain the goods until his account was paid, but no right of sale. The lien is an additional security; the bailee may sue on his debt and if he recovers judgment the lien affords him the advantage of assuring him property of the debtor on which he may levy execution. By statute the right of sale is often given, but being in derogation of the common law the statute must be strictly followed.

By contract provision may be made for a sale by the lienholder.

§ 144. — **Waiver of lien.**—“Lien can not survive possession; and except in case of fraud, and perhaps mistake, such a lien can not be restored by resumption of possession. Therefore the voluntary parting with possession of the goods will amount to waiver by surrender of the lien.” By mutual consent the lien could be revived, but not so as to affect the intervening rights of third persons.

Moreover, “an agreement to give credit, or a special contract for a particular mode of payment inconsistent with a lien, is a waiver of it.” And the bailee by express consent, or by conduct from which consent may justly be implied, may waive the lien. Indeed, any act of the bailee inconsistent with the existence of a lien is evidence of a waiver thereof.

§ 145. — **Termination of the lien.**—Payment or tender of the debt by the bailor discharges the lien and makes the bailee if he refuses to surrender possession of the goods liable in

· § 143. [44] *Whitlock v. Heard*, Stoddard Woolen Manufactory v. 13 Ala. 776; 48 Am. D. 73; *Knapp Huntley*, 8 N. H. 441, 31 Am. D. v. *McCaffrey*, 178 Ill. 107, 52 N. 198; *Hale v. Barrett*, 26 Ill. 195, 79 E. R. 898, 69 Am. St. R. 290; Am. D. 367; *Chandler v. Belden*, 18 [45] *Doane v. Russell*, 3 Gray Johns. (N. Y.) 157, 9 Am. D. 193; (Mass.) 382. *Hanna v. Phelps*, 7 Ind. 21, 63 Am.

§ 144. [37] *Sensenbrenner v. D. 410; McKenzie v. Nevius*, 22 Me. Matthews, 48 Wis. 250, 3 N. W. R. 138, 38 Am. D. 291. 569, 33 Am. R. 809; *Miller v. Mar-* § 145. [44] *Whitlock v. Heard*, ston, 35 Me. 153, 56 Am. D. 694; 13 Ala. 776, 48 Am. D. 73; *Hanna*

trover for conversion. The lien-holder by any act inconsistent with the character of his possession and denying the title of the owner destroys his lien; and any act amounting to a waiver of the lien, of course, works its extinction. By mutual consent of the parties the lien may be terminated at any time.

§ 146. **Property rights of bailor and bailee.**—The bailee for hired services has a right to retain the chattel and to earn his compensation. * This amounts to a special property in the chattel which he may maintain against all the world including the bailor. He is also answerable over to the bailor for the chattel, and so may recover from third persons for injury to the property or for its conversion. He may also insure the property for its full value. In any case, he may recover not only the amount of his own interest, but the full amount of the loss or insurance, and after satisfying his own claim hold the balance as trustee for the bailor.

The bailor, too, has property in the chattel which he may vindicate against the whole world including the bailee. As against third persons, a recovery by either bailor or bailee is a bar to an action by the other party. As against the bailee for a fixed term, the bailor need make no demand before bringing suit, and the same is true if the bailee has converted the property to his own use. In other cases demand must be made before suit is brought. No right of action accrues until such termination of the term, or conversion by the bailee, or demand by the bailor, and the statute of limitations will not begin to run in favor of the bailee until such right exists. But demand must be made within a reasonable time or the laches of the bailor will defeat his right to relief.

v. Phelps, 7 Ind. 21, 63 Am. D. 410; 488; Reizenstein v. Marquardt, 75 Iowa 294, 39 N. W. R. 506, 9 Am. D. 291; McIntyre v. Carver, 2 Am. St. R. 477; Goodwin v. Ray, 108 Tenn. 614, 69 S. W. R. 730, 91 Am. St. R. 761; [47] American

§ 146. [41] Burdick v. Murray, District Telegraph Co. v. Walker, 3 Vt. 302, 21 Am. D. 588; Waring v. 72 Md. 454, 20 Atl. R. 1, 20 Am. St. R. 479; Halyard v. Dechelman, 29 N. Y. 606, 6 Am. R. 146; Fire Insurance Co. v. Transportation Co., 66 Md. Mo. 459, 77 Am. D. 585; Lancaster Mills v. Merchants', etc., Co., 89 339, 7 Atl. R. 905, 59 Am. R. 162; Tenn. 1, 14 S. W. R. 317, 24 Am. Baird v. Daly, 57 N. Y. 236, 15 Am. St. R. 586.

§ 147. **Care.**—The *ordinary care* required in mutual benefit bailments has been explained in its general principles. By way of special application to *locatio operis* bailments it may be noted that the bailee must use the care ordinarily exercised under like conditions by the class to which he belongs. The skill professed by a carriage painter and by the painter of a costly picture differs greatly, and so does the care to be demanded of a watch repairer and a blacksmith. Each must use ordinary care according to his profession; and this not because of any contract to that effect, but because of the duty laid upon the party by law. By the established and well known usages of trade or by contract this liability may be modified; but not so as to excuse the bailee from the exercise of any care, and not by a condition promulgated by the bailee after entering upon the undertaking. The hired bailee is liable for nonfeasance as well as for misfeasance for the acts of his servants and agents in the course of their employment as well as for his own acts. The burden of proof in showing neglect by the bailee has been sufficiently explained (§ 17).

§ 148. **Special locatio custodiae bailments.**—There are certain bailees who are engaged in the business, often quasi-public, of providing for the safe-keeping of the goods of those who choose to employ them. Such are warehousemen, wharfingers, safe-deposit companies, factors, commission merchants, agisters and liverymen. They are subject for the most part to the principles governing other bailees for hired custody, but their rights and duties are in some respects peculiar.

Warehousemen, Elevator Owners, Cold Storage Companies.

§ 149. **Warehousemen** are bailees whose business it is to keep goods and merchandise in storage for hire. In some of the states grain elevators serving the public indifferently in the

§ 147. [1] *Coggs v. Bernard*, 2 R. 306, 14 Am. St. R. 688; Hal-
Ld. Ray. 909, 1 Sm. Ld. Cas. 199; yard v. Dechelman, 29 Mo. 459, 77
Kelton v. Taylor, 11 Lea (Tenn.) Am. D. 585.
264, 47 Am. R. 284; [47] American § 149. [43] *Schmidt v. Blood*, 9
District Telegraph Co. v. Walker, 72 Wend. (N. Y.) 268, 24 Am. D. 143;
Md. 454, 20 Atl. R. 1, 20 Am. St. Yockey v. Smith, 181 Ill. 564, 54
R. 479; Swann v. Brown, 6 Jones's N. E. R. 1048, 72 Am. St. R. 286;
Law (N. C.) 150, 72 Am. D. 568; Schwerin v. McKie, 51 N. Y. 180,
Dale v. See, 51 N. J. L. 378, 18 Atl. 10 Am. R. 581.

storage of grain are made public warehouses with duties of a public nature; but warehousemen are generally private bailees like other bailees for hired custody. Even owners of bonded warehouses, designated by the government for the storage of dutiable goods in bond until the revenue is paid, and put in charge of the government storekeeper, are private warehousemen liable as ordinary bailees for hire; and so are cold storage companies erecting warehouses for the keeping for hire of perishable goods by means of artificial cold. Railroad companies, as soon as they cease to be common carriers, become warehousemen of the goods until the goods carried have been received by the consignee.

§ 150. — **Effect of usage.**—The general principles governing *locatio custodiae* bailments apply to warehouse storage, but in determining the relations undertaken usage and custom are of particular force. Those making contracts with reference to a particular business are presumed to know of the uniform practices of such business; "this usage may therefore, in the absence of an agreement to the contrary, reasonably be supposed to have entered into and formed part of their contracts and understandings in relation to such business as ordinary incidents thereto. And where usage in a particular trade or business is known, uniform, reasonable, and not contrary to law, or opposed to public policy, evidence of such usage may be considered in ascertaining the otherwise uncertain meaning of a contract unless the proof of such usage contradicts the express terms of the agreement." But usage will not be allowed to contradict or vary a general rule of law.

§ 151. — **Warehouse receipts** describing the property, its ownership, charges for storage and the undertaking of the warehouseman, are commonly issued to one storing goods in

§ 150. [48] *Morningstar v.* 101 U. S. 557; *Anderson v. Portland Flouring Mills Co.*, 37 *Oreg. R.* 593, 59 *Am. R.* 211; *Drudge v.* 483, 60 *Pac. R.* 839, 82 *Am. St. R.* 771; *Dolliff v. Robbins*, 83 *Minn. R.* 34, 63 *Am. St. R.* 359; *Pribble v.* 498, 86 *N. W. R.* 772, 85 *Am. St. R.* 466; *Burton v. Curryea*, 40 *Ill.* 320, *Kelton v. Taylor*, 11 *Lea (Tenn.)* 89 *Am. D.* 350; [24] *Geilfuss v.* 264, 47 *Am. R.* 284; *Chase v. Washburn*, 1 *Ohio St.* 244, 59 *Am. D.* 623. *Corrigan*, 95 *Wis.* 651, 70 *N. W. R.* 306; 60 *Am. St. R.* 143; *Insurance*

§ 151. [49] *Shaw v. Railway Co.*, *Co. v. Kiger*, 103 U. S. 352.

a warehouse. Only warehousemen can issue them. They are not, like negotiable instruments, representatives of money, but of the goods, and like bills of lading are regarded as so much merchandise. Their delivery for the purpose of transfer has the same effect as a delivery of the property itself, no more, no less; it passes to the transferee all the title and rights of the transferer and those only.

They are not negotiable at common law, and when made so by statute it has been held that they are not so in the sense that bills, notes and other representatives of money are negotiable, but in the sense that they are all like bills and notes transferable by indorsement and delivery. They are contracts as well as receipts, and often contain terms defining and restricting the liabilities of the warehouseman. These, when not contrary to public policy, will be effectual between the parties. Compare Sec. 222, *post*.

§ 152. — **Confusion of goods.**—Like other bailees the warehouseman is bound to return the identical goods stored. It has already been seen (§ 8) that grain of different owners stored in an elevator is commonly mixed in one mass, each depositor becoming owner in common of his share of the whole. The elevator owner is bound to keep in the bins enough grain to satisfy the demands of all the depositors. Failure to do this is conversion to the extent of the deficiency.

§ 153. — **Care.**—The warehouseman does not undertake to keep the goods safely, but only to use ordinary diligence in keeping them, and is not liable for loss arising from theft or accident for which he was not in fault. He undertakes that

§ 152. See in addition to the cases cited in § 8, *Drudge v. Leiter*, 18 Ind. App. 694, 49 N. E. R. 34, 63 Am. St. R. 359; [48] *Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. R. 593, 59 Am. R. 211. R. 581; *Parker v. Union Ice and Salt Co.*, 59 Kas. 626, 54 Pac. R. 672, 68 Am. St. R. 383; *Marks v. New Orleans Cold Storage Co.*, 107 La. 172, 31 So. R. 671, 90 Am. St. R. 285; *Allen v. Somers*, 73 Conn. 355, 47 Atl. R. 653, 84 Am. St. R. 158; *Minnesota Butter and Cheese Co. v. St. Paul Cold Storage Warehouse Co.*, 75 Minn. 445, 77 N. W. R. 977, 74 Am. St. R. 515; *Taussig v. Bode*, 134 Calif. 260, 66 Pac. R. 259, 86 Am. St. R. 250; *Lancaster Mills v. Merchants', etc., Co.*, 89

§ 153. [48] *Schmidt v. Blood*, 9 Wend. (N. Y.) 268, 24 Am. D. 143; [9] *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. R. 467; *Willett v. Rich*, 142 Mass. 356, 7 N. E. R. 776, 56 Am. R. 684; *Moulton v. Phillips*, 10 R. I. 218, 14 Am. R. 663; *Schwerin v. McKie*, 51 N. Y. 180, 10 Am.

the warehouse is reasonably safe, fit for its purpose and free from defects which could have been discovered by ordinary care. It should be equipped with modern appliances and improvements in general use by his class of custodians for the protection of the goods against injury by theft, fire, rats, heat and other destroying agents. If he keeps a cold storage warehouse he undertakes to maintain the necessary temperature or, if for good cause that is impossible, to give his customers timely warning to remove their property. If the bailor has equal knowledge of the defect and fails to protect his property, his contributory negligence will preclude his holding the warehouseman liable. The warehouseman may insure the goods stored for their full value, but in the absence of a contract he is not compelled to do so. By contract the warehouseman may make himself liable in every event, or excuse liability except for his or his servants' positive negligence.

§ 154. — **Lien.**—The warehouseman's lien, as already pointed out, is specific, not general, and is restricted to the services rendered in relation to the whole quantity deposited at one time or under one contract.

§ 155. — **Duration of the relation.**—The duties of the warehouseman begin as soon as the property has been delivered into his control and accepted by him and continue until he has yielded control to one entitled to receive the goods. He may assume control by actual acceptance of the goods in his warehouse, by a custom to accept goods left in a given place in the warehouse, or by actually taking them in charge before they come to the warehouse. His control may be terminated in a similar manner. It is held that when the crane of the warehouse is attached to the goods to raise them into the warehouse, the warehouseman's liability begins; and when grain reaches the spout carrying it from the elevator, the elevator owner's liability as a warehouseman ends.

Tenn. 1, 24 Am. St. R. 586; Hickey [42] Steinman v. Wilkins, 7 Watts v. Morrell, 102 N. Y. 454, 7 N. E. & S. (Pa.) 466, 42 Am. D. 254. R. 321, 55 Am. R. 824; Pope v. § 155. Ducker v. Barnett, 5 Mo. Milling Co., 130 Calif. 139, 62 Pac. 97, The R. G. Winslow, 4 Biss. (U. R. 384, 80 Am. St. R. 87. S.) 13; Rodgers v. Stopfel, 32 Pa. § 154. [43] Schmidt v. Blood, 9 St. 111; 72 Am. D. 775; Blin v. Wend. (N. Y.) 268, 24 Am. D. 143; Mayo, 10 Vt. 56, 33 Am. D. 175.

Other Special Bailees for Hire.

§ 156. **Wharfingers** are those who keep wharves for the purpose of receiving goods for hire. Their undertaking as bailees is essentially that of warehousemen, and their rights and duties are subject to the rules just stated. Usage has large place in connection with the undertaking of the wharfinger, but it must not be in conflict with established rules of law.

§ 157. **Factors or commission merchants** make it their business to receive goods for sale upon commission. As custodians of the goods they are bound to store them in safe warehouses, and must use the diligence of warehousemen in caring for them. The factor is one of the few bailees whom the usages of trade have given a general lien on the goods in his possession to secure a general balance of account.

§ 158. **Safe-deposit companies** undertake for hire to furnish a drawer or box in burglar-proof safes or vaults in which papers or other valuables may be safely kept. Notwithstanding they have not that full control of the property usually given to bailees, their relation to the depositor is held to be that of bailee to bailor. They are not depositaries since the service is not gratuitous. They undertake to exercise ordinary care which, in view of the nature of the business, means a high degree of diligence and watchfulness. In the absence of a special agreement they are not insurers of the safety of the valuables deposited in the rented boxes. They must provide what they profess to furnish, must keep pace with improvements and safety appliances and use that high care that ordinarily prudent men are wont to bestow on property of such special value.

- § 156. Chapman v. State, 104 Calif. 690, 38 Pac. R. 457, 43 Am. St. R. 158; Willey v. Allegheny City, 118 Pa. St. 490, 12 Atl. R. 453, 4 Am. St. R. 608; Wooster v. Blossom, 9 Jones's L. (N. C.) 244, 72 Am. D. 549; Blin v. Mayo, 10 Vt. 56, 33 Am. D. 175; Rodgers v. Stophel, 32 Pa. St. 111, 72 Am. D. 775; Cox v. O'Reiley, 4 Ind. 368, 58 Am. D. 633.
- § 157. McKenzie v. Nevius, 22 Me. 138, 38 Am. D. 291; Vincent v. Rather, 31 Tex. 77, 98 Am. D. 516; [1] Coggs v. Bernard, 2 Ld. Raymond 909, 1 Sm. L. Cas. 199.
- § 158. [7] Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162; Safe Deposit Co. v. Pollock, 85 Pa. St. 391, 27 Am. R. 660; Cussen v. Southern California Savings Bank, 133 Calif. 534, 65 Pac. R. 1099, 85 Am. St. R. 221; Mayer v. Bernsinger, 180 Ill. 110, 54 N. E. R. 159, 72 Am. St. R. 196.

§ 159. **Agisters and liverymen** as bailees for hire need little special mention. As already noted they formed almost the only classes of hired bailees that at the common law had no lien on the bailed chattels as security for their compensation; but now by statute they have been given such a lien. The agister must keep his pasture properly enclosed, and the liveryman his stable in proper condition and the animals properly secured therein.

§ 159. Cecil v. Preuch, 4 Martin B. 951, 72 Am. St. R. 828; Costello (N. S.) (La.) 256, 16 Am. D. 171; v. Ten Eyck, 86 Mich. 348, 49 N. W. Swann v. Brown, 6 Jones's L. (N. B. 152, 24 Am. St. R. 128; Halty v. C.) 150, 72 Am. D. 568; Lambert Markel, 44 Ill. 225, 92 Am. D. 182. v. Nicklass, 45 W. Va. 527, 31 S. E.

PART III.

OF EXTRAORDINARY BAILMENTS.

CHAPTER IX.

OF INNS AND INNKEEPERS.

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| <p>§ 160. Summary.</p> <p>161. Historical.</p> <p>162. Distinctions.</p> <p style="padding-left: 20px;">1. <i>The nature of the relation.</i></p> <p style="padding-left: 40px;">(a) <i>The innkeeper and his accommodations.</i></p> <p>163. Definition of innkeeper.</p> <p>164. The accommodations.</p> <p>165. Who are not innkeepers.</p> <p>166. —Sleeping car companies.</p> <p>167. —Steamboat companies.</p> <p>168. —Boarding and lodging houses and restaurants.</p> <p>169. Holding out as innkeeper.</p> <p style="padding-left: 20px;">(b) <i>The guest.</i></p> <p>170. Definition.</p> <p>171. —Transients.</p> <p>172. —Acceptance by the innkeeper.</p> <p>173. —Non-acceptance as a guest.</p> | <p>§ 174. Duration of the relation.</p> <p style="padding-left: 20px;">2. <i>Rights and duties of the parties.</i></p> <p>175. Duty to receive guest.</p> <p>176. —Excuses for refusal.</p> <p>177. Duty to receive goods.</p> <p>178. Liability of innkeeper.</p> <p>179. Liability to guest personally.</p> <p>180. Liability for goods.</p> <p>181. —Exceptional liability.</p> <p>182. —Exceptions.</p> <p>183. —Burden of proof.</p> <p>184. —For what property liable.</p> <p>185. —Owner's custody.</p> <p>186. —Limitation of liability.</p> <p>187. Compensation and lien.</p> <p style="padding-left: 20px;">3. <i>Termination of the relation.</i></p> <p>188. How terminated.</p> |
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§ 160. A summary of the previous chapters shows that we have considered gratuitous bailments, in which the promisor (bailor or bailee) receives no compensation, and mutual benefit bailments, in which the promisor has his reward. Of the latter class are *locatio rei* and *locatio operis* bailments, and of the second of these those that are ordinary have been already treated. But extraordinary *locatio operis* bailments, in which the promisor stands in an exceptional relation, still remain for examination. Reserving for consideration in later chapters the subject

§§ 161-162 OF EXTRAORDINARY BAILMENTS.

of common carriers, we take up now the innkeeper as an exceptional bailee with reference to the baggage of his guest; and it will be convenient in this connection also to consider the relation of the innkeeper to his guest personally, which is not one of bailment.

§ 161. **Historical.**—Formerly all bailees were strictly accountable to the bailor for the bailed goods (Holmes's Common Law). This liability, modified largely as to most bailees, still attaches with some diminution to innkeepers and common carriers. The reason they have not been relieved of this extraordinary liability is the peculiar opportunity offered them for fraud and plunder in the lawless times of the Middle Ages when the highways to London were so infested with thieves and robbers that traveling without an armed escort was unsafe. The only safe haven on the Continent was the monastery, the inns being rather places where thieves divided their plunder and planned their raids, than places of repose and safety for travelers. In England the strict accountability of the innkeeper made the English inn a place of security and comfort. Though conditions have become more settled, still the guest is peculiarly at the mercy of the innkeeper and his servants, and the increased facilities for travel have so multiplied the number of transients seeking our modern hotels that there is scarcely less need of the protection of the law for the wayfarer in a strange place. Statutes in most of our states have modified some of the harsh features of the old common law with reference to the innkeeper; yet the courts on the whole have been loath to depart from the rigid regulations formerly applied to them.

§ 162. **Distinctions.**—*Tavern, inn, hotel*, are words of different origin. The first originally applied to places furnishing food and drink rather than lodging; inn was the recognized word in the law; while hotel has been adopted from the French within the past century and has come to be the word in popular use. In this country the three words have come to have practically the same meaning.

§ 161. *Cromwell v. Stephens*, 2 Daly (N. Y.) 15; *Hulett v. Swift*, 33 N. Y. 571, 88 Am. D. 405; *[50] Kisten v. Hildebrand*, 9 B. Monroe (Ky.) 72, 48 Am. D. 416.

§ 162. See these words in any dictionary, and the historical account of Daly, J. in *Cromwell v. Stephens*, 2 Daly (N. Y.) 15.

In conformity with the general plan of the work we shall consider, 1, the nature of the relation; 2, its rights and duties; and 3, its termination. The nature of the relation calls for a definition (a) of the innkeeper and the accommodation he offers, and (b) of the guest.

1. THE NATURE OF THE RELATION.

(a) *The Innkeeper and His Accommodations.*

§ 163. **Definition.**—The innkeeper is one who holds himself out to furnish lodging, or lodging and other entertainment, to transients for hire.

§ 164. **The accommodations.**—Formerly the inn offered all the entertainment the traveler might require for himself, his beast, and his traveling equipments. Changes in the modes of travel and conditions of life have called for the modification of the definition of an inn. The inn of to-day may furnish all and more than its predecessor; but it is nevertheless an inn though it provide no entertainment for the traveler's horse, though it keep no liquors, though it be run on the "European plan" and furnish lodging only, though it be open for the summer or the winter season. But it is essential as to the entertainment that it should furnish lodging and usually meals for the traveler, though the development of the European hotel seems likely to modify this last requirement.

§ 165. **Who not innkeepers.**—But one is not an innkeeper who furnishes occasional entertainment only; who keeps a restaurant or coffee-house providing food only; who keeps a

§ 163. [50] *Kisten v. Hildebrand*, 9 B. Monroe (Ky.) 72, 48 Am. D. 416; [53] *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. R. 258; *Howth v. Franklin*, 20 Tex. 798, 73 Am. D. 218; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. D. 657; [51] *Mowers v. Fethers*, 61 N. Y. 34, 19 Am. R. 244; [52] *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 26 Pac. R. 1099, 28 Pac. R. 943, 27 Am. St. R. 198.

§ 164. [52] *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 26 Pac. R. 1099, 28 Pac. R. 943, 27 Am. St. R. 198.

B. 1099, 28 Pac. R. 943, 27 Am. St. R. 198; [50] *Kisten v. Hildebrand*, 9 B. Monroe (Ky.) 72, 48 Am. D. 416; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. D. 657; *Hancock v. Rand*, 94 N. Y. 1, 46 Am. R. 112.

§ 165. [50] *Kisten v. Hildebrand*, 9 B. Monroe (Ky.) 72, 48 Am. D. 416; [53] *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. R. 258; *Howth v. Franklin*, 20 Tex. 798, 73 Am. D. 218; *Meacham v. Galloway*, 102 Tenn. 415, 52 S. W. R. 859, 73 Am. St. R. 886.

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boarding house for the entertainment of regular boarders merely—though one may be an innkeeper as to transients and not an innkeeper as to boarders kept in the house—; who keeps an apartment house for regular lodgers even though a transient may occasionally be accommodated.

§ 166. —**Sleeping car companies.**—Neither are sleeping car companies considered in law as innkeepers. Every reason for excluding them has been effectually refuted save one, but it is well settled by an overwhelming weight of authority that they are not innkeepers, nor subject to their liability. The most cogent reason for this rule is that the “peculiar liability of the innkeeper is one of great rigor and should not be extended beyond its proper limits.” The difference between the European hotel and the modern compartment sleeper is that one is stationary, the other on wheels; but one is an inn, the other is not.

§ 167. —**Steamboat companies,** too, by the weight of authority, are not innkeepers. They are common carriers “and no one is subject to both liabilities at the same time and with regard to the same property,” but in one case it was said, “The relations between a steamboat company and its passengers who have procured state rooms differ in no essential respect from those that exist between the innkeeper and his guests.”

§ 168. —**Boarding and lodging houses and restaurants,** as already intimated, are not inns. A boarding house keeper does not hold himself out to entertain transients; the keeper of a restaurant offers no lodging. They are bailees for hire and are required to exercise with reference to the effects of

§ 166. Compare [53] Pullman Steamboat Co., 151 N. Y. 163, 45 N. E. R. 369, 56 Am. St. R. 616.

Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. R. 258, and Pullman Palace Car Co. v. Lowe, 28 Neb. 239, 44 N. W. R. 226, 26 Am. St. R. 325. See also [54] Blum v. Southern Pullman Palace Car Co., 1 Flip. (U. S.) 500; Lawson on Bailments and Carriers; Adams v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. R. 369, 56 Am. St. R. 616.

§ 168. [50] Kisten v. Hildebrand, 9 B. Monroe (Ky.) 72, 48 Am. D. 416; Meacham v. Galloway, 102 Tenn. 415, 52 S. W. R. 859, 73 Am. St. R. 886; Taylor v. Downey, 104 Mich. 532, 62 N. W. R. 716, 53 Am. St. R. 472; Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. R. 253, 54 Am. St. R. 483; Moore v. Long Beach Development Co., 87 Cal. 483, 26 Pac. R. 92, 22 Am. St. R. 265.

§ 167. Compare [55] Clark v. Burns, 118 Mass. 275, 19 Am. R. 456, with Adams v. New Jersey

the sojourner ordinary care in view of the nature of their undertaking. As to regular boarders in a hotel the proprietor is in the relation of boarding house keeper, not of innkeeper.

§ 169. **Holding out as innkeeper.**—It is the fact that he holds himself out to receive all transients who may chose to seek his inn, who come in proper condition, able and willing to pay for their accommodation, that is the final test in determining whether one is an innkeeper or not. If he so holds himself out he is an innkeeper though he may make special contracts with part of his customers, or furnish some with board only. If he does not so hold himself out he is not an innkeeper though he may accommodate transients occasionally. He may hold himself out by his actions as well as by his declarations or the use of the sign in front of his inn.

(b) *The Guest.*

§ 170. **Definition.**—Having considered the innkeeper and the accommodation he offers to furnish, we next inquire who is a guest? A *guest* is a transient who resorts to an inn as such and is accepted by the innkeeper. This definition leads to an inquiry as to who is meant by a *transient* and what is *acceptance* by the innkeeper.

§ 171. —**Transients.**—Exact definition of a transient is difficult. He has been referred to as a traveler, a wayfarer,

§ 169. [52] *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 26 Pac. R. 1099, 28 Pac. R. 943, 27 Am. St. R. 198; *Howth v. Franklin*, 20 Tex. 798, 73 Am. D. 218; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. D. 657; *Markham v. Brown*, 8 N. H. 523, 31 Am. D. 209; *Houser v. Tully*, 62 Pa. St. 92, 1 Am. R. 390.

§ 170. *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 Am. D. 688; [56] *Curtis v. Murphy*, 63 Wis. 4, 22 N. W. R. 825, 53 Am. R. 242.

§ 171. [56] *Curtis v. Murphy*, 63 Wis. 4, 22 N. W. R. 825, 53 Am. R. 242; [50] *Kisten v. Hildebrand*, 9 B. Monroe (Ky.) 72, 48 Am. D. 416; *Vance v. Throckmorton*, 5 Bush (Ky.) 41, 96 Am. D. 327; *Magee v. Pacific Improvement Co.*, 98 Cal. 678, 33 Pac. R. 772, 35 Am. St. R. 199; [52] *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 26 Pac. R. 1099, 28 Pac. R. 943, 27 Am. St. R. 198; *Cunningham v. Bucky*, 42 W. Va. 671, 26 S. E. R. 442, 57 Am. St. R. 878; *Carter v. Hobbs*, 12 Mich. 52, 83 Am. D. 762; *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. D. 657; *Meacham v. Galloway*, 102 Tenn. 415, 52 S. W. R. 859, 73 Am. St. R. 886; *Hancock v. Rand*, 94 N. Y. 1, 46 Am. R. 112; *Lusk v. Belote*, 22 Minn. 468.

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a temporary lodger or stranger, a temporary sojourner whose stay is precarious and uncertain. It may be for a day, a week or a month, on special terms or with no advance agreement, for the purpose of taking lodging, refreshment, or both. He may be a resident of the same town with the innkeeper if he comes as a traveler, and not as a neighbor or friend. One who comes on a special contract to board is usually a boarder, but a transient may inquire in advance the charge for his entertainment and receive special rates. The only essential is that he be a transient whose stay is more or less temporary and uncertain.

§ 172. —**Acceptance by the innkeeper.**—A transient may become a guest before calling for a room, or registering his name, or even entering the inn, though these are the usual steps taken by a traveler in becoming a guest. The porter by taking charge of his baggage at the station may accept him as a guest for the innkeeper. If he intends to resort to the inn as such, the entertainment he receives may be lodging and board, lodging alone or board only; it may be for a single meal, or merely for a drink at the bar, though resorting to the inn for that purpose alone could scarcely make him a guest; he may change his plan altogether and leave before receiving any entertainment; in any of these cases, if he went to the inn for entertainment as a transient and was accepted by the innkeeper he became a guest.

§ 173. —**Non-acceptance as a guest.**—But not every one who resorts to an inn is a guest. Regular boarders, social guests of the innkeeper, those attending a ball or banquet at the inn, one going to the inn to carry on a regular business or to find a safe depository for money, and one resorting to the inn

§ 172. [57] Bennett v. Mellor, 5 R. 80; [51] Mowers v. Fethers, 61 T. R. 273; Read v. Amidon, 41 Vt. N. Y. 34, 19 Am. R. 244; Mason 15, 98 Am. D. 560; Coskery v. v. Thompson, 9 Pick. (Mass.) 280, Nagle, 83 Ga. 696, 10 S. E. R. 491, 20 Am. D. 471; Arcade Hotel Co. v. 20 Am. St. R. 333; Dickinson v. Wiatt, 44 Ohio St. 32, 4 N. E. R. 398, 58 Am. R. 785; [56] Curtis v. Winchester, 4 Cush. (Mass.) 114, 50 Am. D. 760; [58] Bowell v. De Murphy, 63 Wis. 4, 22 N. W. R. 825; Wald, 2 Ind. App. 303; 28 N. E. R. 53 Am. R. 242; Moore v. Long Beach Development Co., 87 Cal, 483, 430.

§ 173. [40] Grinnell v. Cook, 3 26 Pac. R. 92, 22 Am. St. R. 265; Hill (N. Y.) 485, 38 Am. D. 663; Neal v. Wilcox, 4 Jones's L. (N. C.) 146, 67 Am. D. 266. Healey v. Gray, 68 Me. 489, 28 Am.

for an unlawful purpose have been held not to be guests. One sending his horse to the inn stables but himself stopping with a friend, has been held to be a guest; but this doctrine is very generally criticised. Unless he personally, or some member of his family visits the inn for entertainment one is scarcely a guest.

§ 174. **The duration of the relation.**—A traveler who as a transient requests entertainment at an inn and is accepted becomes instantly a guest. He remains such until the relation is terminated by one of the acts to be later noticed. Leaving the inn for a temporary purpose does not ordinarily terminate the relation, nor does the length of time a man remains at the inn if he retains his transient character.

2. RIGHTS AND DUTIES OF THE PARTIES.

§ 175. **Duty to receive.**—The innkeeper having taken upon himself a public employment must serve the public. His first duty is to receive indifferently to his inn as guests such travelers as may ask for entertainment. He has no general right to select his guests. This is not the result of a contract, but it is a duty imposed by law for a violation of which the innkeeper is liable in such damages as will compensate the traveler for the wrong, and punitive damages besides if there are aggravating circumstances.

§ 176. —**Excuses for refusal.**—But the innkeeper is not bound to receive every one who calls at his inn. His duty extends only to transients, who come in proper condition, for a proper purpose, ready, able and willing to pay for their

§ 174. [40] Grinnell v. Cook, 3 D. 416; [51] Mowers v. Fethers, 61 Hill (N. Y.) 485, 38 Am. D. 663; N. Y. 34, 19 Am. R. 244; Hancock v. Rand, 94 N. Y. 1, 46 Am. R. 112; [50] Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. D. 416; [53] Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. R. 258; [56] Curtis v. Murphy, 63 Wis. 4, 22 N. W. R. 825, 53 Am. R. 242; [56] Curtis v. Murphy, 63 Wis. 4, 22 N. W. R. 825, 53 Am. R. 242. § 176. [56] Curtis v. Murphy, 63 Wis. 4, 22 N. W. R. 825, 53 Am. R. 242; [51] Mowers v. Fethers, 61 N. Y. 34, 19 Am. R. 244; [50] Kisten v. Hildebrand, 9 B. Mon. (Ky.) 72, 48 Am. D. 416; O'Brien, v. Vaill, 22 Fla. 627, 1 Am. St. R. 219. Atwater v. Sawyer, 76 Me. 538, 49 Am. R. 634; McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. R. 291, 39

keep. And they must take such accommodations as the inn affords and have no right to demand admittance after the accommodations of the inn are fully taken. The innkeeper owes no duty to persons who are drunken and disorderly, or affected with a contagious disease, who seek the inn to expose their commodities for sale, or resort to it for an illegal purpose, or who are not able to pay for their entertainment. But he cannot negligently or wantonly eject from the inn one already a guest on the ground that he is unfit to remain.

§ 177. **Duty to receive goods.**—The duty to receive the goods of the traveler is part and parcel of the innkeeper's duty to receive the traveler himself. Though the courts have hesitated to decide that goods and money of any value may be forced into the custody of the innkeeper, it is settled by the great weight of authority that the traveler is not limited to the goods and money that he needs for the purposes of the journey.

§ 178. **Liability of innkeeper.**—The duty of the innkeeper does not end with receiving the guest and his goods. His duty continues so long as the transient remains a guest, or the goods remain at the inn. It now becomes our business to inquire into the nature and extent of this liability.

§ 179. **Liability to the guest personally.**—To the guest the innkeeper owes the duty to provide proper accommodations and entertainment so long as the relation endures. This involves keeping the inn in a safe and sanitary condition, providing wholesome food and using all reasonable efforts to protect the person of the guest from harm. For unwarranted assaults upon the guest by himself or his servants the innkeeper is liable in damages; and he must take all reasonable

Am. St. R. 699, and compare Markham v. Brown, 8 N. H. 523, 31 Am. D. 209, with State v. Steele, 106 N. C. 766, 11 S. E. R. 478, 19 Am. St. R. 573.

§ 177. [53] Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. R. 258; Hancock v. Rand, 94 N. Y. 1, 46 Am. R. 112; Mateer v. Brown, 1 Cal. 221, 52 Am. D. 303.

§ 179. Weeks v. McNulty, 101

Tenn. 495, 48 S. W. R. 809, 70 Am. St. R. 693; Gilbert v. Hoffman, 66 Iowa, 205, 23 N. W. R. 632, 55 Am. R. 263; Sheffer v. Willoughby, 163 Ill. 518, 45 N. E. R. 253, 54 Am. St. R. 483; McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. R. 291, 39 Am. St. R. 699; Rommel v. Schambacher, 120 Pa. St. 579, 11 Atl. R. 779, 6 Am. St. R. 732.

precautions to protect his guests from attack by fellow-guests or strangers. If he harbors drunken or vicious men he will be liable for the natural results. He is not an insurer of the personal security of his guest, but he undertakes to use reasonable care to protect him from injury.

§ 180. **Liability for goods.**—As to the goods brought to the inn by a boarder or one not a guest, or by a guest for show or sale, and for goods left in the inn by a former guest the innkeeper is an ordinary bailee and subject to ordinary liability. But as to the goods brought to the inn by the guest he is an exceptional bailee with liabilities which call for special consideration.

§ 181. —**Exceptional liability.**—It is the duty of the innkeeper not only to receive, but to keep safely the goods of his guests so long as they are within the inn, *infra hospitium*. Decisions are not in harmony as to the extent of the innkeeper's liability for losses to the goods. Three rules have been suggested:

(1) That the innkeeper is *prima facie* liable for the loss of goods in his charge, but he may excuse himself by showing that he was free from negligence.

(2) That the innkeeper is excused if he can show the loss was due to inevitable accident or irresistible force.

§ 180. [56] *Curtis v. Murphy*, 63 N. H. 553, 66 Am. D. 745; [50] Wis. 4, 22 N. W. R. 825, 58 Am. R. Kisten v. Hildebrand, 9 B. Mon. 242; *Carter v. Hobbs*, 12 Mich. 52, (Ky.) 72, 48 Am. D. 416; *McDaniels v. Robinson*, 26 Vt. 316, 62 Am. 83 Am. D. 762; *Amey v. Winchester*, 68 N. H. 447, 39 Atl. R. 487, 73 D. 574; *Hulett v. Swift*, 33 N. Y. Am. St. R. 614; *Taylor v. Downey*, 571, 88 Am. D. 405; [60] *Cutler v. Bonney*, 30 Mich. 259, 18 Am. R. 104 Mich. 532, 62 N. W. R. 716, 53 127; [54] *Blum v. Pullman Palace Am. St. R. 472*; [51] *Mowers v. Car Co.*, 1 Flip. (U. S.) 500; *Mateer Fethers*, 61 N. Y. 34, 19 Am. R. 244; v. Brown, 1 Cal. 221; 52 Am. D. Healey v. Gray, 68 Me. 489, 28 Am. R. 80; *Arcade Hotel Co. v. Wiatt*, 303; [58] *Bowell v. DeWald*, 2 Ind. 44 Ohio St. 32, 4 N. E. R. 398, 58 App. 303, 28 N. E. R. 430; *Coskery Am. R. 785*; *Neal v. Wilcox*, 4 v. Nagle, 83 Ga. 696, 10 S. E. R. Jones's Law (N. C.) 146; 67 Am. 491, 20 Am. St. R. 333; *Shaw v. D. 266*; *Mateer v. Brown*, 1 Cal. 221, Berry, 31 Me. 478, 52 Am. D. 628; 52 Am. D. 303; *Wear v. Gleason*, 52 Pinkerton v. Woodward, 33 Cal. Ark. 364, 12 S. W. R. 756, 20 Am. 557, 91 Am. D. 657; *Laird v. Eichold*, 10 Ind. 212, 71 Am. D. 323; St. R. 186; *Murray v. Marshall*, 9 Shultz v. Wall, 134 Pa. St. 262, 19 Colo. 482, 59 Am. R. 152. Atl. R. 742, 19 Am. St. R. 686.

§ 181. [59] *Sibley v. Aldrich*, 33

(3) That the innkeeper is an insurer of the goods against all losses not due to the act of God, the public enemy, or the negligence of the guest.

The weight of authority is probably with the last rule, but the weight of reason and the trend of legislation is with the second. In New York after the case of *Hulett v. Swift*, the rule was modified by statute so as to excuse innkeepers from liability for loss by accidental fires.

§ 182. —**Exceptions.**—The scope in bailment law of the terms act of God, public enemy and negligence of the owner will be considered in connection with the liability of the common carrier (§§ 231-240). For the present it is enough to say that the authorities are agreed that for losses due to those causes the innkeeper is not liable, unless his negligence contributed to the result.

If the loss is caused by the negligence of the guest, his servant or companion, the innkeeper is excused; but it is not as matter of law negligence in the guest to leave his door unlocked. The inn should be safe, and if the guest's property is stolen by the inn servants, fellow-guests or strangers, the innkeeper is liable. What constitutes negligence of the guest in a given case is a mixed question of law and fact to be determined by the jury under instructions from the court.

The effect of loss by inevitable accident, such as fire, or superior force, such as robbery, is in dispute. By the better rule in such cases no legal liability attaches if the innkeeper can prove that he was free from negligence.

§ 183. —**Burden of proof.**—Whatever the rule of liability and whatever the cause of the loss the burden of proving that he is excepted from liability is on the innkeeper; the guest has

§ 182. See cases cited in Sec. 181, 2 Ind. App. 303, 28 N. E. R. 430; and *Cunningham v. Bucky*, 42 W. Sheffer v. Willoughby, 163 Ill. 518, Va. 671, 26 S. E. R. 442, 57 Am. St. 4 N. E. R. 253, 54 Am. St. R. 483; R. 878; *Epps v. Hinds*, 27 Miss. *Dunbier v. Day*, 12 Neb. 596, 12 N. 657, 61 Am. D. 528; [61] *Murchison W. R. 109, 41 Am. R. 772; Shultz v. Sergeant*, 69 Ga. 206, 47 Am. R. v. Wall, 134 Pa. St. 262, 19 Atl. R. 754; *Hadley v. Upshaw*, 27 Tex. 742, 19 Am. St. R. 686; [61] *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. 547, 86 Am. D. 654; *Read v. Amidon*, 41 Vt. 15; 98 Am. D. 560; R. 754; *Carhart v. Wainman*, 114 Spring v. Hager, 145 Mass. 186, 13 Ga. 632, 40 S. E. R. 781, 88 Am. St. N. E. R. 479, 1 Am. St. R. 451. R. 45.

§ 183. [58] *Bowell v. De Wald*,

only to establish his loss. The law presumes that the loss was one for which the innkeeper was liable.

§ 184. —**For what property.**—The extraordinary liability of the innkeeper, as has been seen (§ 180), extends only to the goods of the guest. And he must have a general or special property in them; it is enough if he has the property as agent, servant or bailee of the owner. For the goods and money of the guest within the inn the innkeeper is responsible, and he “is not restricted to any particular or limited amount of goods or money,” nor to goods or money carried by the guest for the purpose of his journey, but he will be liable for goods of whatever kind that are brought within the inn by the guest.

But the goods must be within the inn, *infra hospitium*. The liability attaches to goods in every part of the inn; and under some circumstances goods not within the walls of the house but in the yard or in an adjoining building, have been held to be *infra hospitium*. If the innkeeper or his authorized agent assume control before the goods reach the inn at all, the goods come within the protection of the rule.

§ 185. —**Owner's custody.**—“The innkeeper's responsibility is co-extensive with his custody and control,” and he may be exonerated if the guest takes upon himself exclusive custody of the goods. But this does not prevent the guest from retaining possession of property for his personal use without releasing the innkeeper from his liability. The innkeeper may provide a safe for the deposit of valuables not

- § 184. *Pinkerton v. Woodward*, 33 Cal. 557, 91 Am. D. 657; *Arcade Hotel Co. v. Wiatt*, 44 Ohio St. 32, 4 N. E. R. 398, 58 Am. R. 785; [40] *Grinnell v. Cook*, 3 Hill (N. Y.) 485; 38 Am. D. 663; *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. R. 655; *Neal v. Wilcox*, 4 Jones's Law (N. C.) 146, 67 Am. D. 266; *Cohen v. Manuel*, 91 Me. 274, 39 Atl. R. 1030, 64 Am. St. R. 225; *Clute v. Wiggins*, 14 Johns. (N. Y.) 174, 7 Am. D. 448; *Albin v. Presby*, 8 N. H. 408, 29 Am. D. 679; *Epps v. Hinds*, 27 Miss. 657, 61 Am. D. 528; *Minor v. Staples*, 71 Me. 316, 36 Am. R. 318, but see *contra*, *Pettigrew v. Barnum*, 11 Md. 434, 69 Am. D. 212. § 185. *Weisenger v. Taylor*, 1 Bush (Ky.) 275, 89 Am. D. 626; [52] *Fay v. Pacific Improvement Co.*, 93 Cal. 253, 26 Pac. R. 1099, 28 Pac. R. 943, 27 Am. St. R. 198; [53] *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. R. 258; *Read v. Amidon*, 41 Vt. 15, 98 Am. D. 560; *Vance v. Throckmorton*, 5 Bush (Ky.) 41, 96 Am. D. 327; [61] *Murchison v. Sergeant*, 69 Ga. 206, 47 Am. R. 754.

needed for daily use, if he does so and informs his guests, then he cannot be held liable, in the absence of negligence or the wrong of his servants, for the loss of such valuables if the guest has preferred not to entrust them to his safe provided for the purpose. And generally the innkeeper may be excused where he has been denied control; but as to most of the property a deposit in the room of the guest in the inn is a deposit with the innkeeper.

§ 186. — **Limitation of liability.**—*By special contract* no doubt the innkeeper, like the common carrier, may limit his liability; and so he may *by notice* brought home to the guest of reasonable rules and regulations, such as requiring the room to be securely fastened and valuables to be deposited in a safe provided for the purpose. But the guest must have notice of such regulations or they are not binding on him.

By statute now it is very generally provided that the innkeeper may protect himself by providing a safe for the deposit of certain valuables, usually described in the statute, and posting a notice to the guests that such valuables must be left in the safe. Some statutes limit the maximum amount of the innkeeper's liability, and others restrict it to money and property carried by the guest for his purpose on the journey. Being in derogation of the common law these statutes are strictly construed and must be literally complied with. If the statute requires notice to be posted in the room notice printed on the hotel register will not avail; but actual notice to the guest is sufficient.

The effect of these statutes is to put the burden of proving the fault on the guest, but they do not excuse the innkeeper for losses due to the wrong of himself or his servants. The statutes requiring goods to be deposited do not apply to articles and money needed for daily use.

§ 187. **Compensation and lien.**—"Compelled to afford entertainment to whomsoever may apply, the law as an indemnity

§ 186. See the statutes of the various states, also 16 Am. & Eng. Ency. of Law, 541; [61] Murchison v. Sergeant, 69 Ga. 206, 47 Am. R. 754; Ramaley v. Leland, 43 N. Y. 539, 3 Am. R. 728; Noble v. Milliken, 74 Me. 225, 43 Am. R. 581; Wilkins v. Earle, 44 N. Y. 172, 4 Am. R. 665; Shultz v. Wall, 134 Pa. St. 262, 19 Atl. R. 742 19 Am. St. R. 686.

§ 187. Cook v. Kane, 13 Ora. 482, 11 Pac. R. 226, 57 Am. R. 28; [40] Grinnell v. Cook, 3 Hill (N.

for the extraordinary liabilities which it imposes, has clothed the innkeeper with extraordinary privileges. It gives him as a security for unpaid charges a lien upon the property of his guest, and upon goods put by the guest into his possession. Nor is the lien confined to property only owned by the guest, but it will attach to the property of third persons for whom the guest is bailee, provided only he received the property on the faith of the innkeeping relation. But the lien will not attach if the innkeeper knew the property taken into his custody was not owned by his guest, who had no right to deposit it as bailee or otherwise, except perhaps some proper charge incurred against the specific chattel."

But it is said the lien will attach to things suitable for the traveler's luggage, even though the innkeeper knew they did not belong to the guest. The lien secures the entire charges against the guest for entertainment and accommodations in the inn of every kind, but it avails only in the case of a guest and not as to boarders. By statutes it is now generally extended to boarding and lodging house keepers as well as innkeepers, and is made enforceable by a sale of the goods according to prescribed regulations.

3. TERMINATION OF THE RELATION.

§ 188. **How terminated.**—Except for cause that would have justified him in refusing to receive the guest the innkeeper has no right to terminate the relation after it is established. As he is bound to receive so he is bound to keep all transients desiring entertainment under proper conditions.

But the guest may terminate the relation at will. When he pays his bill and has his name stricken from the hotel register he ceases to be a guest. Temporary absence of the guest from the inn does not necessarily terminate the relation,

Y.) 485, 38 Am. D. 663; *Singer* Peeples, 60 Miss. 819, 45 Am. R. Mfg. Co. v. Miller, 52 Minn. 516, 423; *McDaniels v. Robinson*, 26 Vt. 55 N. W. R. 56, 38 Am. St. R. 568; 316, 62 Am. D. 574; [40] *Grinnel v. Brown Shoe Co. v. Hunt*, 103 Iowa 586, 72 N. W. R. 765, 64 Am. St. R. 198; *Swan v. Bournes*, 47 Iowa 501, 29 Am. R. 492; *Murray v. Marshall*, 9 Colo. 482, 59 Am. R. 152. *v. Cook*, 3 Hill (N. Y.) 485, 38 Am. D. 663; *Adams v. Clem*, 41 Ga. 65, 5 Am. R. 524; *Murray v. Marshall*, 9 Colo. 482, 59 Am. R. 152; *Wear v. Gleason*, 52 Ark. 364, 12 S. W. R.

§ 188. *O'Brien v. Vaill*, 22 Fla. 756, 20 Am. St. R. 186. *627*, 1 Am. St. R. 219; *Miller v.*

but as soon as the innkeeper ceases to derive a profit for his entertainment the relation of innkeeper and guest ends. The innkeeper's liability for the guest's baggage does not cease until there has been a reasonable opportunity for the guest to remove it.

OF EXTRAORDINARY LOCATIO BAILMENTS.

OF COMMON CARRIERS.

CHAPTER X.

OF COMMON CARRIERS OF GOODS.

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| § 189. Definition and classification. | § 194. (3) Kind of goods carried. |
| 190. Private carriers. | 195. (4) Customary means and route. |
| <i>Common carriers of goods.</i> | 196. (5) Action for refusal. |
| 1. <i>Nature of the relation.</i> | 197. Illustrations of common carrier. |
| 191. The common carrier defined. | 198. —Those who are not common carriers. |
| 192. (1) Public employment. | |
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§ 189. **Definitions and Classifications.**—A carrier is one who undertakes to transport chattels or persons from place to place. Various classifications may be made:

- (a) Carriers by land and by water.
- (b) Private carriers and public or common carriers.
- (c) Initial carriers and connecting carriers.
- (d) Carriers of goods and of persons.

Carriers by land and by water are for the most part subject to the same rules, but call for special consideration in certain features which will be mentioned as the topics are reached.

Carriers of goods undertake either the gratuitous service of the *mandatum* bailment, or the service for hire of the *locatio operis mercium vehendarum* bailment. Of the carriers for hire *private carriers* are subject to the general rules governing all *locatio* bailments; *common carriers* are subject to those rules and more. Because one who entrusts his property to the carrier is in the nature of the case so helpless to protect himself against the negligence or fraud of the carrier, the law imposes upon the common carrier an exceptional liability. The application of steam as a motive power has so increased the importance of the carrier to society that the law of common carriers

in its extent and variety easily overshadows that of all other bailments together.

Initial carriers are those to whom the consignor delivers his goods for shipment. *Connecting carriers* are any except the initial over whose lines the goods pass between the initial place and their destination. The last of the connecting carriers is called the *terminal carrier*.

Carriers of goods are bailees and so are properly considered under the subject of bailments. *Carriers of passengers* are not, as such, bailees, but their duties are very similar to those of the bailee and such carriers are usually carriers of goods as well, so that it is convenient if not strictly logical to consider them side by side. Hence the title of this work, "Bailments and Carriers."

§ 190. *Private carriers* are such as undertake by special agreement in particular instances only to transport goods or passengers from place to place. As they are subject to no exceptional liabilities they call for no further consideration than that already given them in preceding chapters.

COMMON CARRIERS OF GOODS.

1. THE NATURE OF THE RELATION.

§ 191. The common carrier is one who holds himself out to transport for hire the goods of such as choose to employ him.

The definition furnishes the following essential characteristics of the common carrier:

- (1) He carries as a public employment.
- (2) The carriage is for hire.

The law then attaches the conditions that:

- (3) He must carry goods offered of the kind he professes to carry.

§ 190. Hutchinson on Carriers, 46 Am. D. 393; [63] Allen v. Sack-
 Sec. 35; [62] Fish v. Chapman, 2 rider, 37 N. Y. 341; Sheldon v. Rob-
 Ga. 349, 46 Am. D. 393; [63] Allen inson, 7 N. H. 157, 26 Am. D. 726;
 v. Sackrider, 37 N. Y. 341; Sheldon [64] Hale v. New Jersey Steam
 v. Robinson, 7 N. H. 157, 26 Am. D. Navigation Co., 15 Conn. 539, 39
 726; Samms v. Stewart, 20 Ohio 70, Am. D. 398; Doty v. Strong, 1 Pinn.
 55 Am. D. 445; Beckman v. Shouse, (Wis.) 313, 40 Am. D. 773; Jack-
 5 Rawle (Pa.) 179, 28 Am. D. 653. son etc. Works v. Hurlbut, 158 N.

§ 191. Dwight v. Brewster, 1 Y. 34, 52 N. E. R. 665, 70 Am. St.
 Pick. (Mass.) 50, 11 Am. D. 133; Rep. 432.
 [62] Fish v. Chapman, 2 Ga. 349,

- (4) By the means and over the route he has established.
- (5) An action lies against him if he refuses without legal justification to perform such carriage.

§ 192. (1) **Public employment.**—He must hold himself out, expressly or by his conduct, to carry for all persons indifferently, and not merely for particular persons; at any time while he is a carrier, and not for special occasions only; as a business and not as a casual occupation. It matters not that he will carry only to a particular place or by a particular route or in a special method, nor that he carries only during a limited time or only a certain kind of goods. If the carrier offers his services to the public indifferently, so long as he has facilities, he is a common carrier. If he does not, he is a private carrier, an ordinary bailee for hire.

§ 193. (2) **For hire.**—As to certain goods, or on special occasions, one who is a common carrier may carry gratuitously, and as to goods so carried he is not a common carrier, but a mandatary held to slight care. But the common carrier serves for reward, and if the carriage be for any pecuniary advantage, either directly or indirectly, the common carrier assumes full liability; and that equally when the compensation is paid in advance and when there is merely an express or implied promise to pay it, when each part of the service is recompensed and when one part is performed free in order to secure the advantage of another part.

§ 194. (3) **Kinds of goods carried.**—To constitute one a common carrier it is not essential that all kinds of goods be

§ 192. *Nugent v. Smith*, 1 C. P. 285, 37 Am. D. 464, and *Moss v. Div. 27*; [65] *Thompson-Houston Electric Co. v. Simon*, 20 Ore. 60, 25 Pac. R. 147, 23 Am. St. R. 86; [62] *Fish v. Chapman*, 2 Ga. 349, 46 Am. D. 393; *Shelden v. Robinson*, 7 N. H. 157, 26 Am. D. 726; *Self v. Dunn*, 42 Ga. 528, 5 Am. R. 544; [85] *Ayres v. Chicago & N. W. Ry. Co.*, 71 Wis. 372, 37 N. W. R. 432, 5 Am. St. R. 226; [63] *Allen v. Sackrider*, 37 N. Y. 341.

For the rules peculiar to Pennsylvania and Tennessee see *Gordon v. Hutchinson*, 1 Watts & S. (Pa.)

§ 193. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story (U. S.) 16; *Knox v. Rives*, 14 Ala. 249, 48 Am. D. 97; *Central Railroad and Banking Co. v. Lampley*, 76 Ala. 357, 52 Am. R. 334; *Self v. Dunn*, 42 Ga. 528, 5 Am. R. 544; [103] *Railroad v. Lockwood*, 17 Wall. (U. S.) 357; [62] *Fish v. Chapman*, 2 Ga. 349, 46 Am. D. 393; *Pierce v. Railway Co.*, 23 Wis. 387.

§ 194. *Honeyman v. Oregon &*

carried. If he offers to carry only particular kinds he may be compelled to accept such goods, but not goods of a sort he does not profess to carry.

§ 195. (4) **Customary means and route.**—The wagoner does not offer to carry by rail, nor the railroad by water; nor need a railroad from X to Y undertake to carry from X to Z. The law compels the carrier to accept goods for carriage only by the means and over the road to which his business is confined.

§ 196. (5) **Action for refusal.**—As a result of the public employment of the common carrier he is within certain limits bound to carry the goods of any person offering to pay his hire. If he refuse to carry he is liable in an action for damages; and this liability to be sued for a refusal to carry has been suggested as the safest test of his character. It seems more logical to say it is the result of his character. If it be established that he is a common carrier then an action lies for a refusal to carry, but in deciding whether an action lies it must first be determined whether he is a common carrier. Once let it be established that he is a common carrier and the law lays upon him the duty to carry for all. To compel this an action lies against a common carrier for refusing to perform this duty.

§ 197. **Illustrations.**—It is no test of the common carrier that he should make regular trips, between fixed points, in any particular kind of vehicle, or for any definite length of time.

- California R. R. Co., 13 Ore. 352, Robinson, 7 N. H. 157, 26 Am. D. 10 Pac. R. 628, 57 Am. R. 20; 726; [63] Allen v. Sackrider, 37 N. [95] Kansas Pacific Ry. Co. v. Y. 341.
- Nichols, 9 Kan. 235, 12 Am. R. 494; § 197. [65] Thompson-Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. R. 147, 23 Am. St. R. 86; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. D. 521; Beckman v. Shouse, 5 Rawle (Pa.) 179, 28 Am. D. 653; Bonce v. The Dubuque Street Ry. Co., 53 Iowa 278, 5 N. W. R. 177, 36 Am. R. 221; Jackson etc. Works v. Hurlbut, 158 N. Y. 34, 52 N. E. R. 665, 70 Am. St. R. 432;
- § 195. Hutchinson on Carriers, Sec. 56 b.
- § 196. [62] Fish v. Chapman, 2 Robertson v. Kennedy, 2 Dana (Ky.) Ga. 349, 46 Am. D. 393; Shelden v. 430, 26 Am. D. 466; Hayes v. Wells,

It has been held that the following are in general common carriers: boatmen, owners of stage coaches, omnibuses, hacks, drays and express wagons, railway, express, street car and steamboat companies. Local carriers of passengers like street railways, hackmen and ferrymen, are common carriers of the baggage of their passengers, but not of goods generally unless they make a business of receiving such goods for transportation.

§ 198. —Those who are not common carriers.—The following have been held not to be in general common carriers: warehousemen, wharfingers, forwarders, sleeping car companies, telegraph and telephone companies, postmasters and mail carriers, owners of towing boats, log-driving and booming companies, bridge, canal and turnpike companies. None of these are entrusted with goods for carriage in such sense as to make them public carriers. But a common carrier cannot escape liability as such by assuming some other name. The real test is the nature of the undertaking, and any of the above may be common carriers if as part of their business they undertake to carry indifferently for such as choose to employ them.

Fargo & Co., 23 Cal. 185, 83 Am. D. 89; [66] Christenson v. American Express Co., 15 Minn. 270, 2 Am. R. 122; Levi v. Lynn & Boston R. R. Co., 11 Allen (Mass.) 300, 87 Am. D. 713; [55] Clark v. Burns, 118 Mass. 275, 19 Am. R. 456; Crosby v. Fitch, 12 Conn. 410, 31 Am. D. 745; [64] Hale v. New Jersey Steam Navigation Co., 15 Conn. 539, 39 Am. D. 398; Parmelee v. Lowitz, 74 Ill. 116, 24 Am. R. 276; Harvey v. Rose, 26 Ark. 3, 7 Am. R. 595.

§ 198. Roberts v. Turner, 12

Johns. (N. Y.) 232, 7 Am. D. 311; [53] Pullman Palace Car Co. v. Smith, 73 Ill. 360, 24 Am. R. 258; Leonard v. Hendrickson, 18 Pa. St. 40, 55 Am. D. 587; Central Railroad & Banking Company v. Lampley, 76 Ala. 357, 52 Am. R. 334; Mann v. Log & Booming Co., 46 Mich. 38, 8 N. W. R. 550, 41 Am. R. 141; Smith v. Western Union Telegraph Co., 83 Ky. 104, 4 Am. St. R. 126; [66] Christenson v. American Express Co., 15 Minn. 270, 2 Am. R. 122.

OF COMMON CARRIERS OF GOODS.

CHAPTER XI.

2. OF THE RIGHTS AND DUTIES OF THE COMMON CARRIER.

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| <p>§ 199. Classification.
 <i>A. The common law rights and duties of the common carrier.</i></p> <p>200. Various kinds of rights and duties.
 <i>(1) Right to compensation.</i></p> <p>201. Carrier's right to compensation.</p> <p>202. Amount of compensation.</p> <p>203. —Statutory control.</p> <p>204. Demurrage.</p> <p>205. Discrimination.</p> <p>206. —What discrimination is unlawful.</p> <p>207. —Interstate Commerce Act.</p> <p>208. —State Statutes.</p> <p>209. On what goods.</p> <p>210. Who liable for freight.</p> <p>211. Carrier's lien.</p> <p>212. —Connecting carriers.</p> <p>213. —Storing goods held on lien.</p> <p>214. —Goods shipped by one not the owner.
 <i>(2) Duty to carry for all.</i></p> <p>215. Public employment.</p> <p>216. Conditions for commencement of duty.
 <i>(a) When liability as common carrier begins.</i></p> <p>217. Delivery and acceptance.</p> <p>218. —Delivery where.
 <i>(b) Evidence of acceptance.</i></p> <p>219. Bill of lading.</p> <p>220. —Issued without goods.</p> | <p>§ 221. —As a contract.</p> <p>222. —Assignability and negotiability.</p> <p>223. —Nature.</p> <p>224. —Duplicate bills.
 <i>(3) Accommodations.</i></p> <p>225. Suitable accommodations.</p> <p>226. Sufficient accommodations.</p> <p>227. —Preferences.</p> <p>228. —Unusual demand for facilities.</p> <p>229. —The Express cases.
 <i>(4) Liability for loss.</i></p> <p>230. Common law rule.</p> <p>231. —Exceptions.</p> <p>232. —(a) Act of God.</p> <p>233. —Inevitable accident.</p> <p>234. —Proximate cause.</p> <p>235. —Diligence of carrier.</p> <p>236. —(b) The public enemy.</p> <p>237. —Negligence of the carrier.</p> <p>238. —(c) Public authority.</p> <p>239. —(d) Act of shipper.</p> <p>240. —Concealing value.</p> <p>241. —(e) Inherent nature of goods.</p> <p>242. —Live animals.</p> <p>243. —Liability for live stock.</p> <p>244. Burden of proof.
 <i>(5) Liability for deviation and delay.</i></p> <p>245. Deviation.</p> <p>246. Delay.</p> <p>247. —Reasonable time.</p> <p>248. —Delay not sole cause of loss.</p> |
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§ 199. **Classification.**—In discussing the rights and duties of the common carrier a distinction is taken between

- (A) The strict rules of the common law, and
- (B) The limited liability under a special contract.

It is the purpose of the present chapter to set forth the common law liability of the common carrier of goods.

A. THE COMMON LAW RIGHTS AND DUTIES OF THE COMMON CARRIER.

§ 200. **The various kinds of rights and duties.**—The common carrier has all the rights, duties and liabilities of the ordinary bailee for hire. These have already been sufficiently considered and will not be repeated. In addition he has exceptional rights and liabilities which will be considered as follows:

- (1) Right to compensation.
- (2) Duty to carry for all.
- (3) Duty to furnish accommodations.
- (4) Liability for loss.
- (5) Liability for deviation and delay.

(1) *Right to Compensation.*

§ 201. **Carrier's right to compensation.**—The primary right of the carrier is that to his reward. He may if he choose demand this in advance and refuse to accept the goods until he has received his hire for their carriage. If however he waives his right to pre-payment, then he must fully perform his service before he can demand his pay, and he is then entitled to recover his compensation before giving up possession of the goods. Unless the carrier has in some way fallen short of performance of his full duty the party liable for the freight cannot secure the goods till the payment of the full charges. Payment of the freight and delivery of the goods are concomitant acts, and the owner need not tender the freight before demanding the goods. It is enough that he is ready to pay.

§ 201. [67] Galena etc. R. R. 206, 37 N. E. R. 39, 53 Am. St. R. Co. v. Rae, 18 Ill. 488, 68 Am. D. 385; Chicago etc. R. R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. R. 451, 574; Fitch v. Newberry, 1 Douglas 50 Am. St. R. 320; China Mutual Grand Trunk Ry. Co., 56 Me. 60, Ins. Co. v. Force, 142 N. Y. 90, 36 96 Am. D. 435; [68] Illinois Central R. R. Co. v. Frankenberg, 54 Ill. N. E. R. 874, 40 Am. St. R. 576; 88, 5 Am. R. 92; Grand Rapids etc. Adams v. Clark, 9 Cush. (Mass.) 215, 57 Am. D. 41. R. R. Co. v. Diether, 10 Ind. App. -

§ 202. **Amount of compensation.**—Except as controlled by statute the rate fixed by the contract governs. It is usual to publish a schedule of rates, and the rate is often specified in the bill of lading, and these if according to the intention of the parties will govern. If there be no contract then it is implied that the usual rates shall be paid, or in the absence of custom, a reasonable rate. What is a reasonable rate is a question of fact for the jury.

§ 203. —**Statutory control.**—The common carrier is not always allowed to fix the amount of his compensation by contract. In many of the states statutes have fixed maximum rates. These statutes are valid unless they violate the constitutional provision against depriving the owner of his property without due process of law. This they may do by fixing the maximum rate unreasonably low so as to amount in effect to a confiscation of the property of the carrier.

§ 204. **Demurrage.**—It is the duty of the consignee to be ready to receive the goods. Compensation to the carrier for delay on the part of the consignee is called demurrage. This is by law allowed to carriers by water as reasonable compensation for improper delay by the consignee. The carrier by land has no demurrage except by special contract or by statute. The reason for the distinction is found in the fact that railroad companies habitually have warehouses in which they discharge their freight. Carriers by water formerly did not, though shipments by water are now to a considerable extent made by companies maintaining such warehouses. In such cases it is apprehended demurrage could be collected only under a contract to that effect.

§ 205. **Discrimination in charges** was not forbidden at common law. Provided the charges to him were reasonable the

§ 202. [69] Louisville etc. Railroad Co. v. Wilson, 119 Ind. 352, 21 N. E. R. 341; Peters v. R. R. Co., 42 Ohio St. 275, 51 Am. R. 814; Baldwin v. Steamship Co., 74 N. Y. 125, 30 Am. R. 277; Killmer v. Railroad Co., 100 N. Y. 395, 3 N. E. R. 293, 53 Am. R. 194; [74] Cook v. Railway Co., 81 Iowa 551, 46 N. W. R. 1080, 25 Am. St. R. 512; Hutchinson on Carriers, 443.

§ 203. [70] Compare Munn v. Illinois, 94 U. S. 113, with [71] Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462.

§ 204. Hutchinson on Carriers, 473 and 473a; [72] Chicago & N. W. Ry. Co. v. Jenkins, 103 Ill. 588.

§ 205. [73] Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. R. 907, 54 Am. R. 846; Cleveland etc. Rail-

shipper could not complain that goods were carried for another at a less rate. The development of carriage by railway with the resulting power put in the hands of the carrying corporations to make or ruin competing shippers has made the question one of vast importance. From the cases, which are conflicting in many points, the following may be deduced:

For reasons of public policy any discrimination in rates between shippers that is oppressive or unjust, or that has a tendency to create a monopoly, is illegal. Mere difference in rates is not of itself unjust discrimination; but a difference for different shippers for transporting the same class of goods under like conditions is unjust and illegal. It amounts to unduly favoring one party at the expense of another.

§ 206. — **What discrimination is unlawful.**—The cases are not wholly reconcilable, but by the better opinion a discrimination is unjust if it is based merely on the amount of freight offered, or if it has a tendency to destroy the trade of one shipper by giving a more favored shipper a practical monopoly, or if a secret rebate is allowed certain shippers. But it is not undue preference to discriminate between local and through freight, between a short haul and a long haul.

§ 207. — **Interstate Commerce Act.**—In the United States the Interstate Commerce Act (1887) undertakes to regulate this question by prohibiting as unlawful every unjust and unreasonable charge; all rebates and unequal charges to different persons for like and contemporaneous services under substantially similar circumstances; all undue and unreasonable preferences or advantages; any greater charge for a shorter than for a longer distance, the shorter being included within the longer distance.

In England the Railway and Canal Traffic Act (1854) prohibits "undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatever."

§ 208. — **State statutes.**—The Interstate Commerce Act

way Co. v. Closser, 126 Ind. 348, 26 Co., 8 Vroom (N. J.) 531, 18 Am. N. E. R. 159, 22 Am. St. R. 593; R. 754.
[74] Cook v. Railway Co., 81 Iowa, § 206. See cases cited under 551, 46 N. W. R. 1080, 25 Am. St. § 205.
R. 512; Messenger v. Pa. Railroad

applies to traffic between different states, but not to transportation wholly within a single state. The state legislatures have very generally passed statutes touching this matter, often fixing a maximum rate. This they have a right to do unless such maximum rate is unreasonably low, amounting to a confiscation of the carrier's property. A requirement that a carrier shall do business at less than will yield a reasonable return on the carrier's investment will be taking property without due process of law, and therefore is unconstitutional.

§ 209. On what goods.—The contract of affreightment is in general held to be indivisible and the shipper is liable for the full amount of the freight after the carrier has accepted the goods for immediate shipment, or in the case of the carrier by water, after the ship has broken ground on the voyage.

On the other hand, the carrier is in general entitled to freight only on goods carried to the destination, or in the case of connecting carriers, to the terminal point on his portion of the journey. If any waste occur *en route* he will be allowed freight only for the portion delivered, and the loss from waste may be set off against the freight. But if the waste or failure to deliver be due to the fault of the shipper or his consignee, or if the contract call for a lump freight, then full recovery may be had, unless the carrier consent to a *pro rata* freight for the distance the goods were carried. If the goods are actually delivered, but are worthless for causes for which the carrier is not liable, he is entitled to his full freight for such goods.

§ 210. Who liable for freight.—*Prima facie* the consignee is the owner of the goods and is therefore liable for the freight. Acceptance of the goods by the consignee with knowledge of

§ 209. [75] Gibson v. Sturge, 10 Miss. 17, 75 Am. D. 90; Hutchinson Exch. 622; Griswold v. New York Ins. Co., 3 Johns. (N. Y.) 321, 3 Am. D. 490; Knight v. Providence and Worcester R. R. Co., 13 R. I. 572, 43 Am. R. 46; China Mutual Ins. Co. v. Force, 142 N. Y. 90, 36 N. E. R. 874, 40 Am. St. R. 576; Dakin v. Oxley, 15 C. B. (N. S.) 646, 109 E. C. L. 646; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. D. 521; Hill v. Leadbetter, 42 Me. 572, 66 Am. D. 305; Bennett v. Byram, 38

§ 210. Hill v. Leadbetter, 42 Me. 572, 66 Am. D. 305; Wooster v. Tarr, 8 Allen (Mass.) 270, 85 Am. D. 707; Holt v. Westcott, 43 Me. 445, 69 Am. D. 74; Hayward v. Middleton, 3 McCord (S. C.) 121, 15 Am. D. 615; Barker v. Havens, 17 Johns. (N. Y.) 234, 8 Am. D. 393; [76] Union Freight R. R. Co. v. Winkley, 159 Mass. 133, 34 N. E. R. 91, 38 Am. St. R. 398.

the essential facts carries with it the obligation to pay the freight unless the consignee is known to be a mere agent.

The presumption that the consignee is the owner may be rebutted and liability fastened on the consignor or a third person. The carrier may always, in the absence of any other party to whom it may look, demand the freight of the consignor, for he made the contract of affreightment and is liable if no one else can be held. The consignee can never be made liable merely by being made consignee without his consent.

§ 211. **Carrier's lien.**—The carrier, being compelled to accept goods offered, has been given by law a lien upon the goods as security for his hire. "This is co-extensive with his right to claim and recover freight," and accordingly, except by special contract or established custom, the carrier's lien is a special and not a general one. It extends to his charges and advances for the particular goods carried, or to the goods carried under one contract, but not to any claims for demurrage or warehouse charges, nor to damages suffered by the carrier through the wrong of the shipper or through his failure to perform all the conditions of the bill of lading. The consignee may set off against the lien any damage to the goods for which the carrier is liable.

§ 212. —**Connecting carriers.**—The lien extends to all the carrying charges. Where goods are shipped over the lines of several connecting carriers, and the last carrier advances the charges of the preceding carriers, he may retain the goods until his full charges and advances are paid, unless he has notice not to pay such charges, or through the bill of lading or otherwise it appears that such charges have been prepaid by the shipper.

§ 211. *Dyer v. Grand Trunk Ry.* Pa. St. 485, 17 Atl. R. 671, 12 Am. Co., 42 Vt. 441, 1 Am. R. 350; *Ames v. Palmer*, 42 Me. 197, 66 Am. D. St. R. 885; [72] *Chicago & N. W. Ry. Co. v. Jenkins*, 103 Ill. 588; 271; [67] *Galena etc. Railroad Co. Hutchinson on Carriers*, 478.
v. Rae, 18 Ill. 488, 68 Am. D. 574; § 212. [46] *Potts v. N. Y. & N. Gregg v. Illinois Central R. R. Co.*, E. R. R. Co., 131 Mass. 455, 41 Am. 147 Ill. 550, 35 N. E. R. 343, 37 Am. R. 247; [77] *Briggs v. Boston etc. St. R. 238*; [46] *Potts v. N. Y. & R. R. Co.*, 6 Allen (Mass.) 246, 83 N. E. R. R. Co., 131 Mass. 455, 41 Am. D. 626; *Knight v. Providence Am. R. 247*; *Adams v. Clark*, 9 Cush. and Worcester R. R. Co., 13 R. I. (Mass.) 215, 57 Am. D. 41; Penn- 572, 43 Am. R. 46.
sylvania R. R. Co. v. Oil Works, 126

§ 213. — **Storing goods held on lien.**—If the carrier tenders the goods and the consignee or owner fails to pay the charges, they may be retained and delivered to a warehouseman for storing. The warehouseman holds them as bailee of the carrier and the owner, and must not, except upon the order of the carrier, deliver them to the owner until the carrier has been paid his charges for transportation. The goods are also liable to the warehouseman for the charges of their storage.

§ 214. — **Goods shipped by one not the owner.**—This lien is good as against the owner, even though the goods have been wrongfully shipped by another, provided the owner had clothed such other with the indicia of ownership, or given him apparent authority to ship the goods. Where however goods are shipped by one without color of right, by the better opinion the carrier is in no better position than the vendee of goods purchased from one having no color of title. The carrier is not bound to carry the goods if they are offered by a wrongdoer, and therefore in such case has no lien for his charges. No man's property can be taken from him by another without his consent.

The carrier's lien is prior to any rights of the consignor, consignee, owner, or creditors of any of these. When goods are stopped *in transitu*, or taken by an officer under process, the carrier may insist upon his charges before giving possession of the goods. The lien however is personal to the carrier and he alone can set it up as a defence against the owner who seeks to recover his goods or their worth. Loss of possession terminates the lien.

(2.) *Duty to Carry for All.*

§ 215. **Public employment.**—“A common carrier is a public carrier. He engages in a public employment, takes upon

§ 213. *Gregg v. Illinois Central* Mass. 455, 41 Am. R. 247; *Saltus R. R. Co.*, 147 Ill. 550, 35 N. E. R. v. *Everett*, 20 Wend. (N. Y.) 267, 343, 37 Am. St. R. 238; *Rankin v.* 32 Am. D. 541; *Ames v. Palmer*, 42 Me. 197, 66 Am. D. 271; *Pennsylvania R. R. Co. v. Oil Works*, 126 Pa. St. 485, 17 Atl. R. 671, 12 Am. St. R. 885; [78] *Rucker v. Donovan*, 13 Kan. 251, 19 Am. R. 84.

§ 214. *Fitch v. Newberry*, 1 Douglas (Mich.) 1, 40 Am. D. 33; *Robinson v. Baker*, 5 Cush. (Mass.) 137, 51 Am. D. 54; *Hale v. Barrett*, 26 Ill. 195, 79 Am. D. 367; [46] *Potts v. N. Y. & N. E. R. R. Co.*, 131 Navigation Co. v. *Merchants' Bank*, 192, and [79] New Jersey Steam

himself a public duty and exercises a sort of public office. He is bound to carry at reasonable rates such commodities as are in his line of business, for all persons who offer them, as early as his means will allow. The very definition of common carriers implies indifference as to whom they may serve, and an equal readiness to serve all who may apply and in the order of their application." Refusal to perform this duty lays the carrier liable to an action for damages; or mandamus will lie to compel him to serve all indifferently.

§ 216. **Conditions for commencement of the duty.**—The primary and most characteristic duty of the common carrier then is his duty to carry for all who offer goods under proper conditions. Such being his duty it is important to determine

- (a) When he has entered upon his undertaking, and
- (b) What evidence of his undertaking is usual or necessary.

(a) *When Liability as Common Carrier Begins.*

§ 217. **Delivery and acceptance.**—The duties and liabilities of the common carrier as such, begin with the delivery of the goods to him or to his authorized agent, and their acceptance for immediate transportation. If something yet remains to be done by the shipper the delivery is not complete and the strict liability of the common carrier does not attach. But delivery cannot be affected by the fact that the carrier for his own convenience does not immediately begin the transportation.

§ 218. —**Delivery where.**—The goods must be delivered at the place and in the manner provided by the carrier, or else

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| <p>6 How. (U. S.) 344; Fitch v. Newberry, 1 Douglas (Mich.) 1, 40 Am. D. 33; [100] Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. D. 455; McDuffee v. Railroad Co., 52 N. H. 430, 13 Am. R. 72; [80] Chicago & N. W. Ry. Co. v. People, 56 Ill. 365, 8 Am. R. 690; Messenger v. Pennsylvania R. R. Co., 8 Vroom (N. J.) 531, 18 Am. R. 754.</p> | <p>Allen (Mass.) 520, 81 Am. D. 718; Illinois Central R. R. Co. v. Smyser, 38 Ill. 354, 87 Am. D. 301; Montgomery etc. Ry. Co. v. Kolb, 73 Ala. 396, 49 Am. R. 54; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. D. 783; Fitchburg etc. Ry. Co. v. Hanna, 6 Gray (Mass.) 539, 66 Am. D. 427; Railway Co. v. Murphy, 60 Ark. 333, 30 S. W. R. 419, 46 Am. St. R. 202; Ladue v. Griffith, 25 N. Y. 364, 82 Am. D. 360.</p> |
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- § 217. Merriam v. Hartford etc. R. R. Co., 20 Conn. 354, 52 Am. D. 344; Blossom v. Griffin, 13 N. Y. 569, 67 Am. D. 75; [81] Judson v. Western etc. Railroad Corporation, 4
- § 218. Merriam v. Hartford etc. R. R. Co., 20 Conn. 354, 52 Am. D.

they must be delivered personally to his agent authorized to receive them. Unless the carrier has established such a custom, leaving the goods upon the premises, or on the depot platform, is not complete delivery, nor is it full delivery to deposit them with an agent of the carrier not authorized to receive them. The shipper has a right to regard those employed at the carrier's usual place for receiving goods as having ample authority to so receive them.

(b) *Evidence of Acceptance.*

§ 219. **Bill of lading.**—No writing is necessary to a complete delivery. When the goods are properly deposited for transportation the carrier's liability begins. But it is customary to enter into some special contract of carriage by means of what is usually denominated a bill of lading, which is both a receipt for the goods and a contract for their carriage.

The bill of lading as a receipt is *prima facie* evidence of delivery to the carrier of a certain quantity of goods of a certain description and value, for transportation to a consignee therein named. But like all receipts it can be varied or contradicted by parol evidence of mistake or fraud as to any or all of its terms descriptive of the goods.

§ 220. —**Bill of lading issued without goods.**—If the agent of the carrier, conniving with the consignor, fraudulently issue a bill of lading without the delivery of any goods, or of the goods described, such consignor and persons taking from him with knowledge acquire no rights by force of the bill of lading.

344; [67] Galena etc. R. R. Co. v. Am. St. R. 293; [83] Morganton Rae, 18 Ill. 488, 68 Am. D. 574; Mfg. Co. v. Ohio River etc. Ry. Co., [82] Tate v. Yazoo etc. Railroad 121 N. C. 514, 28 S. E. R. 474, 61 Co., 78 Miss. 842, 29 So. R. 392, 84 Am. St. R. 679; [69] Louisville etc. Am. St. R. 649; Railway Co. v. Railroad Co. v. Wilson, 119 Ind. 352, Murphy, 60 Ark. 333, 30 S. W. R. 21 N. E. R. 341.
419, 46 Am. St. R. 202.

§ 220. [84] Friedlander v. Railway Co., 130 U. S. 416, 9 Sup. Ct. 570; *contra*, Bank of Batavia v. Railroad Co., 106 N. Y. 195, 12 N. E. R. 433, 60 Am. R. 440. See also § 219. [82] Tate v. Yazoo etc. Railroad Co., 78 Miss. 842, 29 So. R. 392, 84 Am. St. R. 649; O'Brien v. Gilchrist, 34 Me. 554, 56 Am. D. 676; Montgomery etc. Ry. Co. v. National Bank of Commerce v. Kolb, 73 Ala. 396, 49 Am. R. 54; Railroad Co., 44 Minn. 224, 46 N. W. Sonia Cotton Oil Co. v. Steamer Red R. 342, 20 Am. St. R. 566, and cases cited therein.
River, 106 La. 42, 30 So. R. 303, 87

Whether an innocent transferee of the bill of lading may hold the railroad liable according to the terms of the bill of lading is a disputed question. By the weight of authority he has no such right, for the agent of the carrier acts within the scope of his authority in issuing a bill of lading only when goods have been received. Some cases set forth strong reasons for holding the carrier liable on such a bill of lading on the ground that he is estopped to deny that his agent received the goods.

§ 221. — **Bill of lading as a contract.**—The effect of stipulations in a bill of lading limiting the carrier's liability will be considered in another chapter. It is important here to notice, that like other written contracts it is a merger of prior and contemporaneous agreements of the parties, and in the absence of fraud or mistake its terms may not be varied or contradicted by parol evidence of an oral agreement.

§ 222. — **Assignability and negotiability of bill of lading.**—A bill of lading is a quasi-negotiable instrument. It is negotiable in that it is transferred by indorsement and delivery, but in other respects it is non-negotiable. The assignment of a bill of lading indorsed thereon passes to the assignee at once the title to the goods represented by the bill as completely as by delivery of the goods themselves. But as against third persons the assignee acquires the title of the assignor, no more, no less; he takes subject to all the equities that would have availed against his assignor. As between the parties mere delivery of the bill without indorsement with the intention to pass title is a good transfer of the goods.

Statutes in some states declare bills of lading to be negotiable. Such statutes are strictly construed, and are held not to change the character of the instrument, but to prescribe the mode of transfer by indorsement like negotiable instruments.

§ 221. [83] *Morganton Mfg. Co. v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570; *Burton v. Curyea*, 40 Ill. 514, 28 S. E. R. 474, 61 Am. St. R. 320, 89 Am. D. 350; *Missouri Pacific Ry. Co. v. Heidenheimer*, 82 Tex. 679; *Louisville etc. Railroad Co. v. Wilson*, 119 Ind. 352, 21 N. E. R. 195, 17 S. W. R. 608, 27 Am. St. R. 341; *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42, 30 So. R. 861; *National Bank of Commerce v. Railroad Co.*, 44 Minn. 303, 87 Am. St. R. 293. 224, 46 N. W. R. 342, 20 Am. St. R. 566. See also Section 151, *ante*.

§ 222. [49] *Shaw v. Railroad Co.*, 101 U. S. 557; [84] *Friedlander*

§ 223. —**Nature of bill of lading.**—This grows out of the nature of a bill of lading. It is a mere symbol, a representative of the property, a substitute for the goods and not, like negotiable paper, a representative of money. When properly indorsed and delivered for the purpose of transferring the title to the property it amounts to a constructive delivery of the goods themselves. The carrier must respect such a transfer if properly made, and deliver the goods according to the indorsed order.

§ 224. —**Duplicate bills.**—It is a common practice for the consignor to ship to himself as consignee, taking duplicate bills of lading. One he sends unendorsed as notice of the shipment to the real consignee; the other he endorses, attaches to it a draft on the real consignee and sends the endorsed bill of lading and draft to a bank in the city to which the goods are consigned, with directions to the bank to deliver the endorsed bill of lading upon payment of the draft.

If the carrier delivers the goods upon presentation of the duplicate unindorsed bill of lading it is liable to the consignor in case of loss. And this is true even where the vendee without paying the draft has fraudulently obtained the indorsed bill of lading, since he thereby obtained no title. The carrier is justified in delivering only upon presentation of the original indorsed bill of lading by the vendee after he has paid the attached draft.

(3) *Duty to Furnish Accommodations.*

§ 225. **Suitable accommodations.**—Before the day of railroads common carriers might furnish such accommodations as they chose, provided they were safe and suited to the under-

§ 223. [49] *Shaw v. Railroad* 573, 39 N. W. R. 899, 9 Am. St. Co., 101 U. S. 557; *Weyand v. Atchison*, *Topeka & Santa Fe Ry. Co.*, 75

Iowa 573, 39 N. W. R. 899, 9 Am. St. R. 504; [84] *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570, *The Idaho*, 93 U. S. 575.

§ 224. *The Thames*, 14 Wall. (U. S.) 98; [49] *Shaw v. Railroad Co.*, 101 U. S. 557; *Weyand v. Atchison*, *Topeka & Santa Fe Ry. Co.*, 75 Iowa

§ 225. *Hutchinson on Carriers*, 292-295d; [80] *Chicago & N. W. Railway Co. v. People*, 56 Ill. 365, 8 Am. R. 690; *Wood v. C., M. & St. P. Ry. Co.*, 68 Ia. 491, 56 Am. R. 861; *Le Barron v. East Boston Ferry Co.*, 11 Allen (Mass.) 312, 87 Am. D. 717; *Beard v. Illinois Central Railroad Co.*, 79 Ia. 518, 44 N. W. R. 800, 18 Am. St. R. 381.

taking the carriers professed themselves ready to perform. But the railroad is a quasi-public corporation exercising the right of eminent domain. It exists under a charter granting large privileges and in turn exacting unusual services. While it is not compelled to receive dangerous goods, or merchandise unsuitable for shipment, yet it is compelled to provide suitable accommodations for the transportation of every article of commerce. Its vehicle must be safe and suitable for the business. Open cars for carrying stock, refrigerator cars for fruit and perishable goods, and proper station facilities as well, the law requires the railroad to provide, and it must keep pace with the march of progress.

§ 226. **Sufficient accommodations.**—The wagoner at the early common law might provide as much or as little accommodations as he pleased. He could not be compelled to accept goods for transportation beyond his facilities. The railroad however must furnish facilities sufficient to accommodate such traffic as should reasonably be anticipated. This does not imply that it must at all times have facilities to respond at once to an unusual and unexpected press of business.

§ 227. **Preferences.**—"The very definition of a common carrier excludes the right to grant monopolies or to give special or unequal preferences. It implies indifference as to whom he may serve and an equal readiness to serve all who may apply and in the order of their application."

§ 228. —**Unusual demand for facilities.**—If a shipper applies for cars the railroad is not required to furnish them at once if it can be done only by depriving other shippers of their facilities. One shipper and one town have no right to demand

§ 226. [85] *Ayres v. Chicago & N. W. Ry. Co.*, 71 Wis. 372, 37 N. W. R. 432, 5 Am. St. R. 226; [67] *Galena etc. Railroad Co. v. Rae*, 18 Ill. 488, 68 Am. D. 574; *Ballentine v. Railroad Co.*, 40 Mo. 491, 93 Am. D. 315; *Chicago etc. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. R. 451, 50 Am. St. R. 320; [68] *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill. 88, 5 Am. R. 92.

v. Maine Central Railroad, 57 Me. 188, 2 Am. R. 31; [79] *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *McDuffee v. Railroad Co.*, 52 N. H. 430, 13 Am. R. 72; *Messenger v. Pennsylvania Railroad Co.*, 8 Vroom (N. J.) 531, 18 Am. R. 754.

§ 228. See the cases cited under Sec. 226 and *Harrison v. Missouri Pacific Railway Co.*, 74 Mo. 364, 41 Am. R. 318; *Michigan Central R. R. Co. v. Burrows*, 33 Mich. 6.

§ 227. *New England Express Co.*

service at the expense of another shipper and another town. The railroad is bound to serve all fairly and in turn, but if it is unable within a reasonable time to provide the facilities called for, it is liable to the shipper in damages if it fails to notify him whether his cars can be furnished; and in any case it will be liable if its failure is due to lack of facilities adequate to do the business it had reason to anticipate. If the railroad contracts to furnish cars it is bound to do so according to the terms of the contract. A local freight agent has implied authority to make such a contract.

§ 229. —**The Express Cases.**—The State Courts in several cases decided that to grant one express company exclusive accommodations and privileges on its passenger trains for carrying on an express business was an unlawful preference, and that another company denied such privilege had an action for damages against the railroad corporation.

But in *The Express Cases* the Supreme Court of the United States decided that railroad companies were not common carriers of express companies. Their duty was to furnish the public at large with express facilities adequate to insure reasonable promptness and security, and they could not be compelled to furnish to all independent express companies equal facilities for doing business upon their passenger trains. This is now the settled rule.

(4) *Liability for Loss.*

§ 230. **Common law rule.**—The common carrier is with certain exceptions an insurer of the safe delivery of the goods entrusted to him.

The rule finds its reason in the opportunities for collusion and fraud by which the owner may be deprived of his goods

§ 229. [86] *The Express Cases*, v. Lockwood, 17 Wall. (U. S.) 357; 117 U. S. 1, 6 Sup. Ct. 542; and [79] *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Fitch v. Newberry*, 1 Douglas (Mich.) 1, 40 Am. D. 33; Me. 188, 2 Am. R. 31, and *McDuffee v. Railroad Co.*, 52 N. H. 430, 13 Am. R. 72.

§ 230. [100] *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. D. 455; [62] *Fish v. Chapman*, 2 Ga. Am. R. 92; *Willock v. Pennsylvania Railroad Co.*, 166 Pa. St. 184, 30

while they are beyond his sight and control, and entrusted to the sole keeping of the carrier. Though robber bands no longer infest the highways, and the business of carrying goods is as thoroughly systematized in its methods as it is vast in its proportions, yet every relaxation of the rigor of the old common law rule has been attended with such evils as abundantly to justify its wisdom. And it is now well settled that only by special contract can the carrier be relieved, and by statute in some states even this means of restricting his liability is denied him.

§ 231. **Exceptions.**—According to the early cases the common carrier is an insurer of the goods against all losses except those arising from

(a) The act of God.

(b) The public enemy.

To these have been added

(c) The act of public authority.

(d) The act of the shipper.

(e) The inherent nature of the goods themselves.

Unless the loss be due to one of these exceptions the carrier cannot excuse himself from liability by showing that the loss was inevitable, that he was entirely free from negligence, or that he had exercised the utmost possible human diligence and foresight. He is absolutely liable.

§ 232. (a) **Act of God.**—The cases do not agree in defining the act of God. By the better opinion it does not depend upon the violence of the force, but it must be a force due to physical

Atl. R. 948, 45 Am. St. R. 674; Brent, 12 Md. 9, 71 Am. D. 582; [64] Hale v. New Jersey Steam Wolf v. American Express Co., 43 Navigation Co., 15 Conn. 539, 39 Mo. 421, 97 Am. D. 406; Colt v. Am. D. 398; Rixford v. Smith, 52 McMechen, 6 Johns. (N. Y.) 160, N. H. 355, 13 Am. R. 42; [87] Hart 5 Am. D. 200; Transportation Co. v. v. Chicago etc. Railway Co., 69 Ia. Tiers, 4 Zab. (N. J.) 697, 64 Am. 485, 29 N. W. R. 597. D. 394; Wald v. Pittsburg etc.

§ 231. See cases cited under Sec. Railroad Co., 162 Ill. 545, 44 N. E. 230, and Agnew v. Steamer Contra R. 888, 53 Am. St. R. 332; Long v. Costa, 27 Cal. 425, 87 Am. D. 87. Pennsylvania Railroad Co., 147 Pa.

§ 232. [88] Forward v. Pittard, St. 343, 23 Atl. R. 459, 30 Am. St. 1 T. R. 27; [89] Railroad Co. v. R. 732; McGraw v. Baltimore & Reeves, 10 Wall. (U. S.) 176; Mer- Ohio R. R. Co., 18 W. Va. 361, 41 ritt v. Earle, 29 N. Y. 115, 86 Am. Am. R. 696; Rixford v. Smith, 52 D. 292; McArthur v. Sears, 21 N. H. 355, 13 Am. R. 42. Compare Wend. (N. Y.) 190; Fergusson v. Michaels v. New York Central Rail-

causes, without the interposition of human agency. Examples are, losses caused by lightning, freshets, earthquakes, frost, rain and snow storms, unprecedented wind and other actions of the elements.

§ 233. —**Inevitable accident** includes the act of God but is not synonymous with it, for inevitable accident, *vis major*, or irresistible force, may be due to human agency. Such are losses by fire (not caused by lightning), by robbery and theft, by decayed timbers in a bridge, by a strike, by a sunken mast, by false lights or a drifted buoy. For loss by any of these means, though no human force could have prevented it, the carrier is liable.

§ 234. —**Proximate cause.**—Not only must the loss be caused by the act of God but that must have been the proximate cause. If some human agency has intervened the carrier is not excused unless the human agency was so connected with the act of God that all amounted to one act.

§ 235. —**Diligence of carrier.**—Loss from disaster due to the force of the elements which no human foresight could have prevented it has been seen is not chargeable to the carrier. But this implies not merely that the loss was caused by the act of God but that it could not have been prevented by the carrier. Overtaken by the act of God the carrier will still be liable

road Co., 30 N. Y. 564, 86 Am. D. 415, and Hays v. Kennedy, 41 Pa. St. 378, 80 Am. D. 627.

§ 233. Merritt v. Earle, 29 N. Y. 115, 86 Am. D. 292; Fergusson v. Brent, 12 Md. 9, 71 Am. D. 582; McArthur v. Sears, 21 Wend. (N. Y.) 190. But compare Hays v. Kennedy, 41 Pa. St. 378, 80 Am. D. 627, with [62] Fish v. Chapman, 2 Ga. 349, 46 Am. D. 393.

§ 234. Merritt v. Earle, 29 N. Y. 115, 86 Am. D. 292; Fergusson v. Brent, 12 Md. 9, 71 Am. D. 582; Blythe v. Railway Co., 15 Colo. 333, 25 Pac. R. 702, 22 Am. St. R. 403; Wolf v. American Express Co., 43 Mo. 421, 97 Am. D. 406; Transportation Co. v. Tiers, 4 Zab. (N. J.) 697, 64 Am. D. 394; McGraw

v. Baltimore & Ohio Railroad Co., 18 W. Va. 361, 41 Am. R. 696. Compare Read v. Spalding, 30 N. Y. 630, 86 Am. D. 426, with Denny v. New York Central Railroad Co., 13 Gray (Mass.) 481, 74 Am. D. 645.

§ 235. [89] Railroad Co. v. Reeves, 10 Wall. (U. S.) 176; Nugent v. Smith, L. R. 1 C. P. Div. 423; Blythe v. Railway Co., 15 Colo. 333, 25 Pac. R. 702, 22 Am. St. R. 403; Smith v. Western Railway, 91 Ala. 455, 8 S. R. 754, 24 Am. St. R. 929; Hays v. Kennedy, 41 Pa. St. 378, 80 Am. D. 627; Wolf v. American Express Co., 43 Mo. 421, 97 Am. D. 406; McGraw v. Baltimore & Ohio Railroad Co., 18 W. Va. 361, 41 Am. R. 696.

unless he uses all reasonable care in the sudden emergency to save the goods. This care is not the utmost care which human sagacity could suggest, but that of the ordinarily prudent man confronted by such conditions.

§ 236. (b) **The public enemy** means an enemy of the country with whom the nation is at war, and pirates who are said to be the enemies of all mankind.

It does not include mobs, rioters, robbers, strikers and insurgents. These, although common enemies of the country, are not technically public enemies and loss by them will not excuse the carrier. An insurrection however may ripen into a rebellion or a revolution, so that a state of open war exists, and then insurgents become public enemies.

§ 237. — **Negligence of the carrier.**—The carrier has always been exempt from liability for losses due to the public enemy, but as in the case of the act of God, it must appear that the public enemy was the proximate cause of the loss and that it could not have been averted by ordinary care on the part of the carrier.

§ 238. (c) **Public authority.**—"If the carrier is excusable for yielding to a public enemy he cannot be at fault for yielding to actual authority what he may yield to usurped authority. Whatever his duty to resist a forcible seizure without process he cannot be compelled to assume that regular process is illegal, and to accept all the consequences of resisting officers of the law."

He will be relieved of liability, therefore, if without his fault the goods are destroyed by the police power of the state, or if they are taken by legal process fair upon its face, when issued against the owner of the goods. The shipper should at once be notified of the seizure so that he may have an opportunity to appear and defend. A seizure under void process is no defence to the carrier.

§ 236. [1] *Coggs v. Bernard*, 2 Ld. Ray. 909, 1 Sm. L. Cas. 199; Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256; *Clark v. Pacific Railroad Co.*, 39 Mo. 184, 90 Am. D. 458; *Lewis v. Ludwick*, 6 Cold. (Tenn.) 368, 98 Am. D. 454.
 § 238. [90] *Pingree v. Railroad Co.*, 66 Mich. 143, 33 N. W. R. 298, 11 Am. St. R. 479; [91] *Stiles v. Davis*, 1 Black. (U. S.) 101; [92] *Bennett v. American Express Co.*, 83 Me. 236, 22 Atl. R. 159, 23 Am. St. R. 774; *Hutchinson on Carriers* 210b-210e, 396-400.
 § 237. *Clark v. Pacific Railroad Co.*, 39 Mo. 184, 90 Am. D. 458.

§ 239. (d.) **Act of the shipper.**—For his own fraud or fault none may hold another liable. If the shipper improperly pack or mark the goods in such manner that it is not apparent to the carrier, or if he load them himself and assume charge of them on the journey, or if he pack them so as to conceal from the carrier their true value and character, he cannot hold the carrier liable for loss due to his own act. To excuse the carrier however it must appear that he was free from negligence.

§ 240. —**Concealing value.**—The shipper is not in general required to reveal the value of goods shipped. But if the carrier asks the value and he fails to reveal it, he cannot hold the carrier liable beyond the amount made known. And if the shipper disguise the box or package, whether intentionally or not, so as to conceal the true value of the goods, and the carrier is thereby led to use less care than goods of such value demand, the shipper must bear the consequences. If he wishes the carrier to assume full liability he should give notice so that due care may be exercised, and proper compensation charged for the added risk.

§ 241. (e.) **Inherent nature of the goods.**—Losses due to the decay, defect, nature or infirmity of the goods themselves have been placed with those caused by the act of God. The same principle clearly applies, and where the carrier has furnished proper accommodations and exercised ordinary care upon the journey, and loss has occurred because of the inherent nature of the goods, no liability attaches.

§ 242. —**Live animals.**—Since the common carrier has become a carrier of animate things it has been recognized that

§ 239. *Miltimore v. Chicago etc. Railway Co.*, 37 Wis. 190; [87] *Hart v. Chicago etc. Railroad Co.*, 69 Iowa 485, 29 N. W. R. 597; *Harvey v. Rose*, 26 Ark. 3, 7 Am. R. 595; [93] *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.) 85, 24 Am. D. 129; *McCarthy v. Louisville & Nashville Railroad Co.*, 102 Ala. 193, 14 S. R. 370, 48 Am. St. R. 29; *Erie Railway Co. v. Wilcox*, 84 Ill. 239, 25 Am. R. 451.

§ 241. [94] *Evans v. Fitchburg Railway Co.*, 111 Mass. 142, 15 Am. R. 19; *McGraw v. Baltimore & Ohio Railway Co.*, 18 W. Va. 361, 41 Am. R. 696; *Rixford v. Smith*, 52 N. H. 355, 13 Am. R. 42; [106] *Moulton v. St. Paul etc. Ry. Co.*, 31 Minn. 85, 16 N. W. R. 497, 47 Am. R. 781.

§ 242. [100] *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. R. 242. [94] *Evans v. Fitchburg*

a different element has been introduced. "Living animals have excitabilities and volitions of their own which greatly increase the risks and difficulties of management. They are carried in a mode entirely opposed to their instincts and habits; they may be made uncontrollable by fright, or, notwithstanding every precaution, may destroy themselves in attempting to break loose, or may kill each other."

Michigan rule.—The Michigan court has gone so far as to hold that a railroad is not a common carrier of live stock, and therefore is as to live stock an ordinary bailee for hire and bound to use ordinary diligence. Other states have not followed this rule.

§ 243. —**Liability for live stock.**—As a common carrier of live stock the railroad's liability is that of an insurer as in other cases, with the exception that it is excused if the loss be due to the vice of the animal itself. But even then the railroad must have used ordinary diligence to prevent loss. It is also required to supply suitable appliances such as stock-cars and yards for loading, feeding and watering the stock at proper intervals on the journey.

The shipper generally accompanies the stock, but if stock is accepted for shipment without an attendant the carrier must give the stock proper care. There are many state and some federal statutes regulating the care of live stock shipped long distances, both for the purpose of preventing cruelty to animals and danger to public health.

§ 244. **Burden of proof.**—The carrier is bound to carry safely, and if he fail to do so the burden is on him to furnish a

Railway Co., 111 Mass. 142, 15 Am. R. 19; *Clarke v. Rochester etc. Railroad Co.*, 14 N. Y. 570, 67 Am. D. 205. Compare [96] *Michigan Southern etc. Railway Co. v. McDonough*, 21 Mich. 165, 4 Am. R. 466, and [95] *Kansas Pacific Railway Co. v. Nichols*, 9 Kan. 235, 12 Am. R. 494; [85] *Ayres v. Chicago & N. W. Railway Co.*, 71 Wis. 372, 37 N. W. R. 432, 5 Am. St. R. 226.

§ 243. *Agnew v. Steamer Contra Costa*, 27 Cal. 425, 87 Am. D. 87;

[85] *Ayres v. Chicago & N. W. Railway Co.*, 71 Wis. 372, 37 N. W.

R. 432, 5 Am. St. R. 226; *Norfolk & Western Railroad Co. v. Harman*, 91 Va. 601, 22 S. E. R. 490, 50 Am. St. R. 855; [94] *Evans v. Fitchburg Railway Co.*, 111 Mass. 142, 15 Am. R. 19; *Lindsley v. Chicago, M. & St. P. Railway Co.*, 36 Minn. 539, 33 N. W. R. 7, 1 Am. St. R. 692; [106] *Moulton v. St. Paul etc. Ry. Co.*, 31 Minn. 85, 16 N. W. R. 497, 47 Am. R. 781. See also 63 Am. St. R. 548, note, and 5 Am. & Eng. Ency. of Law, 430.

§ 244. [92] *Bennett v. American Express Co.*, 83 Me. 236, 22 Atl. R.

valid excuse. If the shipper proves delivery of the goods to the carrier and the delivery of them by the carrier in a damaged condition, or an utter failure of the carrier to deliver, the law raises the presumption that the carrier is liable. This can be repelled only by proof by the carrier that the loss was due to one of the excepted perils.

Some cases hold that he must also prove that he was free from negligence, but by the weight of authority if the shipper asserts that notwithstanding the loss was caused by the act of God or other excepted peril, still the carrier did not exercise ordinary care to mitigate or prevent the loss, he and not the carrier must assume the burden of proving such negligence.

(4.) *Liability for Deviation and Delay.*

§ 245. *Deviation.*—The carrier not only undertakes the transportation, but he engages to carry by the usual route. Any material deviation is an assertion of a right of control in himself, and makes him liable for conversion. He becomes an insurer of the goods even against the excepted perils, and it affords him no excuse that they would have been subject to the same perils on the usual route.

But a sudden emergency may justify a deviation. It must appear however that the safety of the goods demanded it, and that it was not practicable to consult the owner.

§ 246. *Delay.*—The first duty of the carrier is to carry safely. His second is to deliver within a reasonable time. As to the first he is an insurer, as to the second his responsibility is that of an ordinary bailee for hire, he must use ordinary dili-

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| <p>159, 23 Am. St. R. 774; [89] Railroad v. Reeves, 10 Wall. (U. S.) 176; [97] Hinkle v. Southern Railway Co., 126 N. C. 932, 36 S. E. R. 348, 78 Am. St. R. 685; Lindsley v. Chicago, M. & St. P. Railway Co., 36 Minn. 539, 33 N. W. R. 7, 1 Am. St. R. 692; Hays v. Kennedy, 41 Pa. St. 378, 80 Am. D. 627; Transportation Co. v. Tiers, 4 Zab. (N. J.) 697, 64 Am. D. 394; Adams Express Co. v. Stettaners, 61 Ill. 184, 14 Am. R. 57. Compare McCarthy v. Louisville & Nashville Railroad Co., 102 Ala. 193, 14 S. R. 370, 48</p> | <p>Am. St. R. 29; Hutchinson on Carriers, 766.
 § 245. [35] Davis v. Garrett, 6 Bing. 716, 19 E. C. L. 321; Crosby v. Fitch, 12 Conn. 410, 31 Am. D. 745; Powers v. Davenport, 7 Black. (Ind.) 497, 43 Am. D. 100; [98] Bennett v. Byram, 38 Miss. 17, 75 Am. D. 90; Louisville & Nashville Railroad Co. v. Odil, 96 Tenn. 61, 33 S. W. R. 611, 54 Am. St. R. 820.
 § 246. [99] Geismar v. Lake Shore & Michigan Southern Railway Co., 102 N. Y. 563, 7 N. E. R. 828, 55 Am. R. 837; [98] Bennett v.</p> |
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gence to effect the transportation with all convenient dispatch. The only excuses for failure to carry safely are the excepted perils; for delay not caused by the carrier's negligence, any inevitable accident, or irresistible force such as fire, mobs, unexpected press of business, will furnish excuse.

Mere delay, even if it be unreasonable, does not amount to a conversion of the goods; and the owner's only remedy in such a case is to accept the goods and look to the carrier for the damage suffered. If danger threaten the goods delay may become a duty, but in any case the carrier must exercise due diligence in caring for the goods delayed, and when the reason for the delay is removed, carry them forward promptly.

§ 247. — **Reasonable time** is to be determined by all the conditions, such as distance, the route, the season, the nature of the goods, etc. Each case must be determined on its own facts.

§ 248. — **Delay not sole cause of loss.**—The authorities are in conflict as to the liability of the carrier for loss by an act of God which would not have overtaken the goods but for unnecessary delay in transportation. The greater number of cases hold the carrier excused on the ground that his negligent delay was not the proximate cause of the loss. But many cases refuse to separate the negligence of the carrier from the act of God. To avail himself of exemption because of the act of God or other excepted peril the carrier must, according to these cases, show that he was free from fault.

Byram, 38 Miss. 17, 75 Am. D. 90; Parsons v. Hardy, 14 Wend. (N. Y.) 215, 28 Am. D. 521; Crosby v. Fitch, 12 Conn. 410, 31 Am. D. 745; [67] Galena etc. Railroad Co. v. Rae, 18 Ill. 488, 68 Am. D. 574; Gulf etc. Railway Co. v. Levi, 76 Tex. 337, 13 S. W. R. 191, 18 Am. St. R. 45; Peet v. Chicago & N. W. Ry. Co., 20 Wis. 594, 91 Am. D. 446. § 247. [98] Bennett v. Byram, 38 Miss. 17, 75 Am. D. 90; McGraw v. Baltimore & Ohio Railroad Co., 18 W. Va. 361, 41 Am. R. 696; Peet v. Chicago & N. W. Ry. Co., 20 Wis. 594, 91 Am. D. 446. § 248. Denny v. New York Cen-

tral Railroad Co., 13 Gray (Mass.) 481, 74 Am. D. 645; [89] Railroad v. Reeves, 10 Wall. (U. S.) 176; Michaels v. New York Central Railroad Co., 30 N. Y. 564, 86 Am. D. 415; Wald v. Pittsburg etc. Railroad Co., 162 Ill. 545, 44 N. E. R. 888, 53 Am. St. R. 332; McGraw v. Baltimore & Ohio Railroad Co., 18 W. Va. 361, 41 Am. R. 696. See also 11 Am. St. R. 363, note; Davis v. Central Vermont Railroad Co., 66 Vt. 290, 29 Atl. R. 313, 44 Am. St. R. 852; Reid v. Evansville & Terre Haute R. R. Co., 10 Ind. App. 385, 35 N. E. R. 703, 53 Am. St. R. 391.

OF COMMON CARRIERS OF GOODS.

CHAPTER XII.

B. LIABILITY UNDER SPECIAL CONTRACT.

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§ 249. **Contracts enlarging liability.**—By special contract the carrier may make himself liable to any extent, or in any manner. He may insure against every risk, even acts of God or the public enemy, against delay and the inherent defects of the goods. He may undertake to ship at a certain time, by a specified train, over a designated route, or to deliver at all hazards by a definite hour. To such contracts fairly entered into impossibility of performance is no defence. Having promised the carrier must perform at his peril.

§ 250. **Contracts limiting liability.**—It is equally well set-

tled that the responsibility of a common carrier may be limited by an express contract assented to by the shipper at the time the goods were accepted by the carrier, in so far as such restrictions are reasonable and not contrary to public policy. Such in substance is the holding of the United States Supreme Court, which has been followed by every state court, though the conditions of liability at common law have, in some states, been restored by provisions in the constitution or by statute.

§ 251. —**Historical.**—The courts, with great unanimity and much reiteration have insisted upon the wisdom of the rule imposing upon the carrier extraordinary liability, and have pointed out the disastrous results of any relaxation of the rule, but with some exceptions they have failed to recognize that they were in effect largely abandoning the rule, even while they were insisting upon its great beneficence, by allowing the carrier to escape its rigor by special contract with the shipper. As Mr. Schouler has pointed out, "The reports bear ample record of the unflagging perseverance with which the common carrier seeks to make decreased responsibility to the public the price of affording to the public increased facilities of transportation; of his quick-wittedness in coaxing, entrapping, even coercing his customers into accomplishing this furtherance of his own ends."

The carrier, at the cost of some annoyance and a vast amount of litigation, has through his use of the special contract wrested from the public, by consent of the courts, almost the same exemptions so strenuously denied him without a contract. So hopeless has been the disadvantage of the shipper in the unequal contest that it was a foregone conclusion that he would

§ 250. [79] *New Jersey Steam Co.*, 24 N. H. 71, 55 Am. D. 222; *Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *Southern Express Co. v. Caldwell*, 88 U. S. 264; [103] *Railroad v. Lockwood*, 17 Wall. (U. S.) 357.

§ 251. Schouler on *Bailments and Carriers*, Sec. 460, 88 Am. St. R. 74, note; *Gould v. Hill*, 2 Hill (N. Y.) 623; [62] *Fish v. Chapman*, 2 Ga. 349, 46 Am. D. 393; [100] *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. D. 455; *Moses v. Boston & Maine Railroad*, 24 N. H. 71, 55 Am. D. 222; [103] *Railroad v. Lockwood*, 17 Wall. (U. S.) 357; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. R. 57; *Gulf etc. Railroad Co. v. Trawick*, 68 Tex. 314, 4 S. W. R. 567, 2 Am. St. R. 494; *Missouri Pacific Railway Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. R. 998; *McDaniel v. Chicago etc. Railway Co.*, 24 Iowa 412; *Ohio etc. Railway Co. v. Tabor*, 98 Ky. 503, 32 S. W. R. 168; *St. Louis etc. Railway Co. v. Sherlock*, 59 Kan. 23, 51 Pac. R. 899.

be obliged to agree to any stipulations the court might allow the carriers to impose; and "goods are in fact now but rarely accepted by them without an agreement or contract for such limitation."

One early case denying this right to the carrier stands alone, although sympathy has been expressed with its rule in other cases, and now in almost every state the validity of contracts exempting the carrier from much of his common law liability is firmly established, though in a few states provisions in the constitutions or statutes forbid all such limitations, or in certain respects restrict them.

§ 252. — **Contract must be express.**—But the contract must be express. A contract enlarging or restricting the carrier's liability is in derogation of the common law, and so is strictly construed against the party in whose favor the changes are made. No exemptions are allowed the carrier except by clear and explicit stipulations in the contract. If terms favoring the carrier are susceptible of two meanings that will be adopted which is the more favorable to the shipper. Exemption of liability for one cause will not by implication be extended to include others.

§ 253. — **Notices.**—Two means have been resorted to by common carriers to evade and lessen liability.

- (1) By public notice.
- (2) By special contract.

Notices have been used for two purposes:

- (a) To call attention to the rules and regulations of the carrier.
- (b) To limit his liability for loss.

(1) *Limitation of Liability by Public Notice.*

§ 254. (a) **Public notices** requiring the shipper to reveal to the carrier what the latter has a right to demand, or pub-

§ 252. [97] *Hinkle v. Southern Railway Co.*, 126 N. C. 932, 36 S. E. R. 348, 78 Am. St. R. 685; [79] *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344; [105] *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331; *Beckman v. Shouse*, 5 Rawle (Pa.) 179, 28 Am. D. 653; [92] *Bennett v. American Express Co.*, 83 Me. 236, 22 Atl. R. 159, 23 Am. St. R. 774; *Southern Express Co. v. Caldwell*, 88 U. S. 264.

§ 254. [100] *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. D. 455; [79] *New Jersey Steam Navi-*

lishing the reasonable rules and regulations of the company as to its manner of doing business, if brought home to the knowledge of the shipper, are binding.

§ 255. —**Notice to reveal value of goods.**—It has been noted that the shipper is not bound to reveal the value of the goods. The carrier however may by public notice brought to the knowledge of the shipper protect itself from liability beyond a fixed amount, unless the shipper reveals the real value so that the carrier may make reasonable charge for the additional risk, and take the necessary precautions to insure safety.

§ 256. —**Notice of rules and regulations.**—Again reasonable rules as to the manner of delivery and entry of freight, rates of freight, the disclosure of the nature of goods, perishable or dangerous, the time and manner of presenting claims for losses and the like may be published by a general notice. "These are but the reasonable regulations which every man should be allowed to establish for his business to insure regularity and promptness, and to properly inform him of the responsibility he assumes."

§ 257. (b) **Notice limiting liability for loss.**—A distinction is to be taken between notices designed to secure expeditious service and fair dealing and those seeking to discharge the carrier from duties imposed upon him by law. If the carrier seeks by public notice to escape duties and liabilities annexed to his employment by law, it is not enough that such notice be brought to the knowledge of the owner of the prop-

gation Co. v. Merchants' Bank, 6 How. (U. S.) 344; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. D. 783.

§ 255. [100] Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. D. 455; [93] Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. D. 129; [62] Fish v. Chapman, 2 Ga. 349, 46 Am. D. 393; [105] Hart v. Pennsylvania Railroad Co., 112 U. S. 331; Willock v. Pennsylvania Railroad Co., 166 Pa. St. 184, 30 Atl. R. 948, 45 Am. St. R. 674.

§ 256. [114] McMillan v. Railroad Co., 16 Mich. 79, 93 Am. D. 208; Western Transportation Co. v. Newhall, 24 Ill. 466, 76 Am. D. 760; Southern Express Co. v. Newby, 36 Ga. 635, 91 Am. D. 783.

§ 257. Erie Railway Co. v. Wilcox, 84 Ill. 239, 25 Am. R. 451; [79] New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. (U. S.) 344; [66] Christenson v. American Express Co., 15 Minn. 270, 2 Am. R. 122; [92] Bennett v. American Express Co., 83 Me. 236, 22 Atl. R. 159, 23 Am. St. R. 774.

erty. To be effectual the restriction must be actually assented to by the owner.

§ 258. —**English rule.**—The attempt of the carrier by posting public notice to limit his liability for loss was favored by the English courts until it resulted in a situation so intolerable as to bring about the passage of the Railway and Canal Traffic Act of 1854, which required that conditions must be embodied in a special contract signed by the shipper, and that they must be such as shall be adjudged by the court or judge, before whom any question relating thereto shall be tried, to be just and reasonable.

§ 259. —**American rule.**—The American courts squarely refused to follow the confessedly unsatisfactory rule reached in England, but held that even though a notice were brought to the shipper's knowledge and he delivered goods thereafter to the carrier, his consent to be bound by the notice was not to be presumed. For "a notice can, at the most, only amount to a proposal for a special contract which requires the assent of the other party. The mere delivery of goods after receiving a notice cannot warrant a stronger presumption that the owner intended to assent to a restricted liability on the part of the carrier, than it does that he intended to insist on the liabilities imposed by law," as he had a right to do.

(2) *Liability Under Special Contract.*

§ 260. **The earlier cases.**—The case of *Hollister v. Nowlen*, *supra*, was followed in a few years by *Gould v. Hill*, in which a special contract was put in the same position as notices, the court regarding the individual shipper as so hopelessly out-matched in contracting with the great carrying corporations

§ 258. [100] *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. D. 455; [103] *Railroad v. Lockwood*, 17 Wall. (U. S.) 357; *Moses v. Boston & Maine Railroad Co.*, 24 N. H. 71, 55 Am. D. 222; *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. D. 783.

§ 259. [100] *Hollister v. Nowlen*, 19 Wend. (N. Y.) 234, 32 Am. D. 455; [79] *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344; [103] *Railroad*

§ 260. *Gould v. Hill*, 2 Hill (N. Y.) 623; [62] *Fish v. Chapman*, 2 Ga. 349, 46 Am. D. 393; [103] *Railroad v. Lockwood*, 17 Wall. (U. S.) 357; *Schouler on Bailments and Carriers*, 460-462.

that it made little difference whether the carrier sought the exemption by public notice or by special contract. It seemed a travesty to speak of mutual assent between two parties on such unequal footing.

§ 261. **United States rule.**—The Supreme Court of the United States in the case of the New Jersey Steam Navigation Co. v. Merchants' Bank, *supra*, disapproved the rule of Gould v. Hill, and in this has been followed by all the state courts, including New York; so that now, apart from statute, the carrier is everywhere permitted by contract assented to by the shipper to secure release from his strict liability. It is now in order to inquire

- (a) How these restrictions may be made.
- (b) How far they may extend.

(a) *Form of Special Contracts.*

§ 262. **Bill of lading.**—When the special contract is in writing its terms are usually incorporated in the bill of lading, which, as already noticed in § 219, is both a receipt and a contract. As a contract it requires mutual assent to its terms. The carrier cannot by his *ex parte* action restrict his liability, but express assent by the shipper is not essential. The courts, with substantial unanimity, have held that when a shipper accepts a bill of lading at the time when he delivers his goods to the carrier he is conclusively presumed, in the absence of fraud and imposition, to have assented to all the terms and conditions, written or printed, therein.

It matters not that he may not have understood them, or even read them, nor that he took the bill but did not sign it. He is conclusively presumed to know the general custom to print such regulations in bills of lading, and if he chooses to accept them without reading he is estopped from denying his assent, so far as the regulations are reasonable and just.

§ 261. [79] New Jersey Steam Railroad Co., 66 Vt. 290, 29 Atl. R. Navigation Co. v. Merchants' Bank, 313, 44 Am. St. R. 852; Grace v. 6 How. (U. S.) 344; Gould v. Hill, Adams, 100 Mass. 505, 97 Am. D. 2 Hill (N. Y.) 623. 117; Belger v. Dinsmore, 51 N. Y.

§ 262. [114] McMillan v. Rail- 166, 10 Am. R. 575; Ballou v. Earle, road Co., 16 Mich. 79, 93 Am. D. 17 R. I. 441, 22 Atl. R. 1113, 33 208; [66] Christenson v. American Am. St. R. 881. *Contra*, Adams Ex- Express Co., 15 Minn. 270, 2 Am. press Co. v. Stettaners, 61 Ill. 184, R. 122; Davis v. Central Vermont 14 Am. R. 57.

§ 263. — **Parol evidence.**—Bills of lading, as contracts, like other written contracts, cannot be varied or contradicted by parol evidence. All previous oral agreements are presumed to be merged in a bill of lading, which is regarded as the final repository of the terms and conditions of the contract of carriage.

§ 264. — **Delivery of bill of lading.**—To effect a contract by means of a bill of lading it is necessary to deliver the bill of lading when the goods are accepted by the carrier. The rule that prior negotiations are merged in the written agreement has no application to a case where the written agreement is imposed upon one party after the other party has begun performance. If the carrier accepts the goods unconditionally, he cannot afterwards, without the consent of the owner, limit his liability by imposing a bill of lading containing restrictions. Of course, the shipper may expressly, or impliedly, or by course of dealing, consent to a future delivery of the contract.

§ 265. **Parol contracts.**—No particular form of contract is necessary between the carrier and shipper. A parol statement by the carrier assented to by the shipper will be as effectual as a written contract, though evidence to prove it is more uncertain. The contract may be partly in writing and partly oral, but merely shipping goods after an oral statement of the conditions of carriage is not conclusive of assent to those conditions. The carrier assumes the burden of proving clearly the mutual agreement.

§ 266. **Tickets, baggage checks, etc.,** cannot be regarded like bills of lading and express receipts. These latter are taken leisurely, are used in trade by way of pledge as security for advances, or they are assigned to transfer title to the goods.

§ 263. See Sec. 221, *ante*; Davis v. Central Vermont Railroad Co., 66 Vt. 290, 29 Atl. R. 313, 44 Am. St. R. 852; [107] Hansen v. Flint & Pere Marquette Railroad Co., 73 Wis. 346, 9 Am. St. R. 791.

§ 264. [101] Bostwick v. Railroad Co., 45 N. Y. 712; Merchants' Despatch Transportation Co. v. Furthmann, 149 Ill. 66, 36 N. E. R. 624, 41 Am. St. R. 265; Gott v.

Dinsmore, 111 Mass. 45; Hutchinson on Carriers, 246-247.

§ 265. Gott v. Dinsmore, 111 Mass. 45; American Transportation Co. v. Moore, 5 Mich. 368; Black v. Transportation Co., 55 Wis. 319, 13 N. W. R. 244, 42 Am. R. 713.

§ 266. Blossom v. Dodd, 43 N. Y. 264, 3 Am. R. 701; [102] Ranchau v. Rutland Railroad Co., 71 Vt. 142, 43 Atl. R. 11, 76 Am. St. R.

They are the representatives of the goods, and are of such importance that a holder cannot be heard to claim ignorance of their contents. Not so with tickets and checks; they are usually taken in haste, represent no goods, and in general contain no terms. They are understood to be mere receipts showing that the holder has paid for a service. They are not in general contracts, ~~but mere evidence~~ of a contract. If they are to serve as contracts also the carrier must indicate that fact, and in some way secure the assent of the owner.

(b) *Extent of the Limitation.*

§ 267. **Limitations reasonable and just.**—Though an almost universal liberty is allowed the carrier to contract for exemptions from his common law liability, the courts, with few exceptions, insist that the stipulations of the contract must be reasonable and just. Even though a shipper may be ready to assent to complete release of the carrier from liability, the courts will not recognize such an agreement because of the interest of the public in preventing the carrier from taking advantage of the individual shipper.

It becomes important then at this point to mark out what is reasonable and not contrary to public policy. For this purpose restrictions may be regarded as intended to limit

- (i) The nature of the liability.
- (ii) The amount of the liability.

(i) *Limitations as to the Nature of the Carrier's Liability.*

§ 268. **General rule.**—It is the rule in most jurisdictions that common carriers may by special contract assented to by

761; *Grace v. Adams*, 100 Mass. 16 N. W. R. 497, 47 Am. R. 781; 505, 97 Am. D. 117; *Kansas City etc. Railroad Co. v. Rodebaugh*, 38 [66] *Christenson v. American Express Co.*, 15 Minn. 270, 2 Am. R. 122; *Davis v. Central Vermont Railroad Co.*, 66 Vt. 290, 29 Atl. R. 313, 44 Am. St. R. 852; *Ballou v. Earle*, 17 R. I. 441, 22 Atl. R. 1113, 33 Am. St. R. 881; *Reid v. Evansville & Terre Haute Railroad Co.*, 10 Ind. App. 385, 35 N. E. R. 703, 53 Am. St. R. 391. See also the notes to 32 Am. D. 498, and 88 Am. St. R. 95.

§ 268. [79] *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U. S.) 344; [103] *Railroad v. Lockwood*, 17 Wall. (U. S.) 357; *So. Exp. Co. v. Caldwell*, 21 Wall. (U. S.) 264; [106] *Moulton v. St. Paul etc. Railway Co.*, 31 Minn. 85,

the shipper be relieved from liability for loss to the goods from any cause not due to the negligence of the carrier, or of his agents or servants. Against negligence the carrier is not permitted to contract.

§ 269. **Special rules.**—In New York a distinction is attempted between the acts of the carrier, and the acts of its agents or servants. Against its own negligence the carrier may not contract, but against that of its agents and servants it may. This distinction is not generally recognized, and in most states is expressly denied; even in New York contracts for such exemptions are construed with great strictness.

In Illinois, and perhaps a few other states, it has been held that carriers are liable for "gross negligence or wilful misfeasance against which good morals and public policy forbid they should be permitted to stipulate." The Illinois courts, however, seem to regard any negligence by the carrier as gross.

In Kentucky, Nebraska, Iowa and Texas the constitution or statutes forbid common carriers to limit or restrict their liability as it exists at common law. In many other states some bounds are set by statute to the carrier's power to contract against liability.

(ii) *Limitations as to the Amount of the Liability.*

§ 270. **Limitations as to amount.**—Despite some apparent conflict in the cases the rule is now well settled that the carrier may by contract limit his liability in case of loss to a fixed amount.

But it must appear that such amount was, for the purpose

§ 269. *Magnin v. Dinsmore*, 56 N. Y. 168; [104] *Mynard v. Syracuse*, etc., *Railroad Co.*, 71 N. Y. 180, 27 Am. R. 28; *Illinois Central Railroad Co. v. Smyser*, 38 Ill. 354, 87 Am. D. 301; *Chicago etc. Railway Co. v. Chapman*, 133 Ill. 96, 24 N. E. R. 417, 23 Am. St. R. 587; *Black v. Goodrich Transportation Co.*, 55 Wis. 319, 13 N. W. R. 244, 42 Am. R. 713; *Ohio, etc., Railway Co. v. Tabor*, 98 Ky. 503, 32 S. W. R. 168; *Missouri Pacific Railway Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. R. 998; *McDaniel v. Chicago etc. Railway Co.*, 24 Iowa, 412; *Gulf etc. Railroad Co. v. Trawick*, 68 Tex. 314, 4 S. W. R. 567, 2 Am. St. R. 494; *St. Louis etc. Railway Co. v. Sherlock*, 59 Kan. 23, 51 Pac. R. 899. See the extended note in 88 Am. St. R. 74.

§ 270. [105] *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151; [106] *Moulton v. St. Paul etc. Railway Co.*, 31 Minn. 85, 16 N. W. R. 497, 47 Am. R. 781; *Alair v. Northern Pacific Railroad Co.*, 53 Minn. 160, 54 N. W. R. 1072, 39 Am. St. R. 588; *Belger v.*

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of transportation, the agreed value of the goods, fairly and honestly fixed as the basis for the carrier's charges and responsibilities; and further, that the shipper was not denied the right, by paying a reasonable compensation, to contract for a greater value, not in excess of the real value of the goods. By the weight of authority such a stipulation fixes the amount of the recovery even when the loss is due to the carrier's negligence. The risk assumed accords with the charges paid and there is no release from liability for negligence up to the value which furnished the basis of the carrier's charges.

§ 271. **Common law duty remains.**—In any case the common law duty remains upon the carrier; he is not at liberty to decline his duties and responsibilities as fixed by law; and the shipper has a right to insist that the goods be carried for a reasonable compensation, insured at their full value against every loss except those from which the carrier was relieved at common law. Any contract which denies, or by imposition, coercion or undue advantage, wrests from the shipper this right, is void. And when a special contract is assented to, the carrier is still a common carrier in all respects except those specifically named in the contract.

§ 272. **Consideration.**—Like other contracts the contract limiting the liability of the carrier must be supported by consideration. Mere acceptance and carriage of the goods is not enough. The consideration usually consists in reduced rates for carriage. When therefore the maximum rates allowed by law are charged the contract limiting liability fails for lack of

Dinsmore, 51 N. Y. 166, 10 Am. R. 575; Ballou v. Earle, 17 R. I. 441, 22 Atl. R. 1113, 33 Am. St. R. 881; Ullman v. Chicago, etc., Railway Co., 112 Wis. 150, 88 N. W. R. 41, 88 Am. St. R. 949.

§ 271. [103] Railroad v. Lockwood, 17 Wall. (U. S.) 357; Moses v. Boston & Maine Railroad Co., 24 N. H. 71, 55 Am. D. 222; [114] McMillan v. Michigan Southern, etc., Railroad Co., 16 Mich. 79, 93 Am. D. 208; Ballou v. Earle, 17 R. I. 441, 22 Atl. R. 1113, 33 Am. St. R. 881; Railway Co. v. Cravens, 57

Ark. 112, 20 S. W. R. 803, 38 Am. St. R. 230; [97] Hinkle v. Southern Railway Co., 126 N. C. 932, 35 S. E. R. 810, 78 Am. St. R. 685; Witting v. St. Louis etc. Railway Co., 101 Mo. 631, 14 S. W. R. 743, 20 Am. St. R. 636.

§ 272. [114] McMillan v. Michigan Southern, etc., Railroad Co., 16 Mich. 79, 93 Am. D. 208; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. R. 575; McFadden v. Missouri Pacific Railway Co., 92 Mo. 343, 4 S. W. R. 689, 1 Am. St. R. 721, and the note to 88 Am. St. R. 88.

consideration. In the absence of proof to the contrary consideration is presumed, the rate being based on the limited liability incurred.

§ 273. Parties to the contract.—An agent entrusted by the owner with goods for shipment has implied power to accept a receipt containing reasonable limitations on the carrier's liability. The consignor has usually such authority for a consignee, but a connecting carrier has no implied authority to accept conditions other than those in its own contract of shipment, or those that are by custom and usage known to the shipper to be the conditions under which the connecting carrier usually carries. But the agent directed to forward goods, in the absence of contrary instructions, is bound to accept the customary receipt, and if he refuse and the carrier in consequence decline to accept the goods, the agent may become personally liable to the consignee for resulting loss.

§ 274. Agents of the carrier.—Railroads act only through agents. No question of the authority of such agent can arise where the company seeks to take advantage of the contract. Acceptance of the contract is affirmance of the power of the agent to make it. But when an agent accepts for the carrier increased obligations, the question of his authority is vital. In general the public have a right to assume that both the general agent, and the local or station agent, have authority to bind the company by reasonable contracts as to matters within the line of their employment. The usage and custom of the carrier are often important in determining whether the act of the agent was within the real or apparent scope of his authority.

§ 275. Burden of proof.—The burden of proving that the loss resulted from a cause included in the exemptions named

§ 273. *Rawson v. Holland*, 59 N. Iowa, 491, 27 N. W. R. 473, 56 Am. Y. 611, 17 Am. R. 394; [114] *Mc-Millan v. Michigan Southern, etc., Railroad Co.*, 16 Mich. 79, 93 Am. D. 208; 88 Am. St. R. 87 and note.

§ 274. *Deming v. Grand Trunk Railway Co.*, 48 N. H. 455, 2 Am. R. 267; *Voorhees v. Chicago, Rock Island & Pacific Railway Co.*, 71 Iowa, 735, 30 N. W. R. 29, 60 Am. R. 823; *Wood v. Chicago, Milwaukee & St. Paul Railway Co.*, 68 Iowa, 491, 27 N. W. R. 473, 56 Am. R. 861; [107] *Hansen v. Flint & Pere Marquette Railroad Co.*, 73 Wis. 346, 41 N. W. R. 529, 9 Am. St. R. 791. Compare *Burroughs v. Railroad Co.*, 100 Mass. 26, 1 Am. R. 78, and *Grover & Baker Sewing Machine Co. v. Missouri Pacific Railway Co.*, 70 Mo. 672, 35 Am. R. 444.

§ 275. *Witting v. St. Louis, etc., Railway Co.*, 101 Mo. 631, 14 S. W. R. 743, 20 Am. St. R. 636; [97] *Hin-*

in the contract rests on the carrier. And even if that be shown he will still be liable if the loss was caused by the negligence of the carrier or his servants.

By the weight of authority the carrier makes out a *prima facie* case by bringing the loss within the exemptions of the contract, and the burden then rests on the owner to show that the carrier was negligent. This rule is vigorously combatted in many cases on the ground that the carrier alone is in position to show how the goods have been treated during transportation, and the burden of proving facts peculiarly within the knowledge of a party should rest upon that party.

kle v. Southern Railway Co., 126 N. Railroad Co., 10 Ind. App. 385, 35 C. 932, 35 S. E. R. 810, 78 Am. St. N. E. R. 703, 53 Am. St. R. 391; K. 685; *Terre Haute etc. Railroad Western Transportation Co. v. New-* Co. v. Sherwood, 132 Ind. 129, 31 hall, 24 Ill. 466, 76 Am. D. 760; N. E. R. 781, 32 Am. St. R. 239; *Southern Express Co. v. Newby*, 36 Reid v. Evansville & Terre Haute Ga. 635, 91 Am. D. 783.

OF COMMON CARRIERS OF GOODS.

CHAPTER XIII.

3. TERMINATION OF THE RELATION.

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§ 276. **Liability as common carrier how ended.**—The duties of the common carrier as such may be terminated

(1) By delivery.

(2) By excuse for non-delivery.

§ 276. *Western Transportation Railroad Co. v. Day*, 20 Ill. 375, 71 Co. v. Newhall, 24 Ill. 466, 76 Am. Am. D. 278; [108] *Fisk v. Newton*, D. 760; *Michigan Southern etc.* 1 Denio (N. Y.) 45, 43 Am. D. 649.

Delivery is the final duty of every carrier, as a carrier, and his extraordinary liability can be ended only by proper delivery of the goods or by a valid excuse for non-delivery.

(1) *Delivery by the Common Carrier.*

§ 277. **Essentials of delivery.**—As proper delivery brings to an end the extraordinary liability of the common carrier it becomes important to define legal delivery. The carrier fulfills his duty only by a delivery

- (a) At a reasonable time.
- (b) At the proper place.
- (c) In a proper manner.
- (d) To the right person.

(a) *Time of Delivery.*

§ 278. **Reasonable time.**—As already brought out (sections 246, 247), the carriage must be completed within a reasonable time after the goods are accepted for transportation. It may now be added that delivery must be made on a proper day and at a reasonable time of the day. What is reasonable depends upon circumstances and custom, but generally speaking the consignee is not bound to receive goods out of business hours, or on a stormy day that makes the removal of the goods dangerous.

(b) *At the Proper Place.*

§ 279. **General rule.**—Formerly, in the absence of established custom to the contrary, it was understood to be the duty of all common carriers to deliver the goods to the consignee

§ 277. *Hutchinson on Carriers*, Andrew v. Whitlock, 52 N. Y. 40, 11 340; *Eagle v. White*, 6 Whar. (Pa.) Am. R. 657; *Richardson v. Goddard*, 505, 37 Am. D. 434; *Marshall v.* 23 How. (U. S.) 28.
American Express Co., 7 Wis. 1, 73 Am. D. 381.

§ 278. *Hill v. Humphreys*, 5 D. 691; *McMasters v. Pennsylvania* Watts & S. (Pa.) 123, 39 Am. D. Railroad Co., 69 Pa. St. 374, 8 Am. 117; *Eagle v. White*, 6 Whar. (Pa.) R. 264; *Turner v. Huff*, 46 Ark. 505, 37 Am. D. 434; *Morgan v. Dible*, 222, 55 Am. R. 580; [110] *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. 264; *Marshall v. American Express Co.*, 7 R 1073, 15 Am. St. R. 426; *Hayes v. Wells-Fargo & Co.*, 23 Cal. 185; *Benedict*, 116 N. Y. 510, 22 N. E. 83 Am. D. 89; *Houston etc. Railway Co. v. Adams*, 49 Tex. 748, 80

personally at his residence or place of business, or according to the directions of the consignor. But any carrier was permitted to show an established usage in his business to make delivery in a different manner. Usage as to the manner of delivery by the various classes of common carriers is now so well established that doubt as to what is the proper manner of delivery by a given carrier rarely arises.

✓ Except where modified by usage personal delivery is still the rule, and the common carrier who would excuse such delivery must establish a custom exempting from the rule the class of carriers to which he belongs. Such usage may be relied on because every person is supposed to contract with reference to the known usages of a trade. Delivery at the usual place is sufficient unless the place of delivery is specified in the contract.

✓ § 280. **Delivery by carriers by water.**—Carriers by water have always been excused from personal delivery. A ship trading from one port to another has not the means of carrying the goods on land; and according to the established course of trade a delivery on the usual wharf and notice to the consignor of the arrival of the goods is such a delivery as will discharge the carrier.

(§ 281. **Delivery by railroads.**—Like carriers by water railroads have fixed places for delivery. Transportation being along a line of rails between definite stations the delivery of goods conveyed by railroads is necessarily confined to certain

Am. R. 116; *Gibson v. Culver*, 17 Wend. (N. Y.) 305, 31 Am. D. 297; [108] *Fisk v. Newton*, 1 Denio (N. Y.) 45, 43 Am. D. 649; *Sonia Cotton Oil Co. v. Steamer Red River*, 106 La. 42, 30 So. R. 303, 87 Am. St. R. 293; *Hutchinson on Carriers*, 341-342.

§ 280. *Hyde v. Trent & Mersey Navigation Co.*, 5 T. R. 389; [110] *Schen v. Benedict*, 116 N. Y. 510, 22 N. E. R. 1073, 15 Am. St. R. 426; *Morgan v. Dibble*, 29 Tex. 108, 94 Am. D. 264; [111] *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 10 Am. R. 402; [108] *Fisk v. Newton*, 1 Denio (N. Y.) 45, 43 Am. D. 649; *McAndrew v. Whit-*

lock, 52 N. Y. 40, 11 Am. R. 657; *Ostrander v. Brown*, 15 Johns. (N. Y.) 39, 8 Am. D. 211; *Kohn v. Packard*, 3 La. 224, 23 Am. D. 453; *Shenk v. Philadelphia Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. D. 541; *Richardson v. Goddard*, 23 How. U. S. 28.

§ 281. [112] *Moses v. Boston & Maine Railroad Co.*, 32 N. H. 523, 64 Am. D. 381; [113] *Norway Plains Co. v. Boston & Maine Railroad Co.*, 1 Gray (Mass.) 263, 61 Am. D. 423; *Bansemmer v. Toledo & Wabash Railway Co.*, 25 Ind. 434, 87 Am. D. 367; *Thomas v. Boston & Providence Railroad Corp.*, 10 Mete. (Mass.) 472, 43 Am. D. 444.

points on the line of the railroad track. Railroad companies cannot, without maintaining an additional wagon service, pass from warehouse to warehouse to discharge their freight on the premises of the various consignees. Accordingly they establish platforms and warehouses on their lines, and there discharge their freight to await the removal by the consignee. The precise moment at which delivery by a railroad to itself as warehouseman terminates its liability as common carrier is considered in sections 301-304, *post*.

§ 282. **Delivery by express companies** has always been personal except at stations too small to warrant keeping special wagons for such delivery. The express companies owe their origin largely to the necessity of personal care and delivery of small packages of considerable value, and to this duty the law holds them with strictness unless a clear and well-established custom has modified their duty in a given instance.

§ 283. — **Shipment C. O. D.**—The law places on the carrier no obligation to receive goods for carriage with the further duty "to collect on delivery," but frequently by contract or custom, carriers, especially express companies, undertake such services, and in such case they must perform the services and deliver the goods according to instructions. The carrier is the agent of the shipper to collect and return the money, and he may allow the consignee to inspect the goods and even to carry them away on condition that if they are not satisfactory they may be returned and the money recovered. If the consignee rejects the goods the shipper should be notified, and the carrier holds the goods as warehouseman.

(c) *In a Proper Manner.*

§ 284. **Delivery safe and convenient.**—In making delivery the carrier is bound to consult the convenience of the consignee

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| <p>§ 282. <i>Baldwin v. American Exp. Co.</i>, 23 Ill. 197, 74 Am. D. 190; [115] <i>Bullard v. American Express Co.</i>, 107 Mich. 695, 65 N. W. R. 551, 61 Am. St. R. 358, and extended note; [109] <i>American Express Co. v. Hockett</i>, 30 Ind. 250, 95 Am. D. 691; [116] <i>Sweet v. Barney</i>, 23 N. Y. 335; <i>Witbeck v. Holland</i>, 45 N. Y. 13, 6 Am. R. 23; <i>Hayes v. Wells</i>,</p> | <p><i>Fargo & Co.</i>, 23 Cal. 185, 83 Am. D. 89; <i>Hutchinson on Carriers</i>, 379-382. § 283. <i>American Express Co. v. Lessem</i>, 39 Ill. 312; [117] <i>Hasse v. American Express Co.</i> 94 Mich. 133, 53 N. W. R. 918, 34 Am. St. R. 328; <i>Weed v. Barney</i>, 45 N. Y. 344, 6 Am. R. 96; <i>Hutchinson on Carriers</i>, 389-393. § 284. <i>Morgan v. Dibble</i>, 29 Tex.</p> |
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and the safety of the goods. They must be so placed as to be convenient of access, under such circumstances that the consignee may receive and take them away with reasonable dispatch and safety. Until he has had an opportunity to do so the carrier is bound to properly protect them from untoward weather and other injurious conditions. Whether the delivery has been made under proper circumstances is a question of fact to be determined from all the evidence in each case.

(d) *To the Right Person.*

§ 285. **Carrier absolutely liable.**—Finally delivery must be made to the right person. “No circumstances of fraud, imposition, or mistake, will excuse the common carrier from responsibility for delivery to the wrong person.” Delivery to one not entitled to receive them is conversion by the carrier, and so is refusal to deliver to the right person when he has properly established his identity and his right to the goods.

§ 286. —**Illustrations.**—Thus the carrier is liable if he delivers the goods to the wrong party by mistake, or to an agent not authorized to receive them, or to one who has secured goods to be sent by the consignor on a forged order. If an order is sent in the name of a fictitious firm, the carrier is liable by the weight of authority even though the delivery is made to the one who sent the order. On this however the

- 107, 94 Am. D. 264; McAndrew v. Houston etc. Railway Co. v. Adams, Whitlock, 52 N. Y. 40, 11 Am. R. 49 Tex. 748, 30 Am. R. 116; 657; Sonia Cotton Oil Co. v. [119] Hawkins v. Hoffman, 6 Hill Steamer Red River, 106 La. 42, 30 (N. Y.) 586, 41 Am. D. 767; So. R. 303, 87 Am. St. R. 293; [120] McEntee v. New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. R. 28; Hutchinson on Carriers, 344. [110] Scheu v. Benedict, 116 N. Y. 510, 22 N. E. R. 1073, 15 Am. St. R. 426.
- § 285. [118] Pacific Express Co. v. Shearer, 160 Ill. 215, 43 N. E. R. 816, 52 Am. St. R. 324; Price v. Oswego and Syracuse Railway Co., 50 N. Y. 213, 10 Am. R. 475; Shenk v. Philadelphia Steam Propeller Co., 60 Pa. St. 109, 100 Am. D. 541; Weyand v. Atchison, Topeka & Santa Fe Railway Co., 75 Iowa 573, 39 N. W. R. 899, 9 Am. St. R. 504;
- § 286. Price v. Railroad Co., 50 N. Y. 213, 10 Am. R. 475; [120] McEntee v. New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. R. 28; Samuel v. Cheney, 135 Mass. 278, 46 Am. R. 467; Adams v. Blankenstein, 2 Cal. 413, 56 Am. D. 350. But compare Dunbar v. Boston & Providence Railroad Corp., 110 Mass. 26, 14 Am. R. 576, and Winslow v. Railroad Co., 42 Vt. 700, 1 Am. R. 365.

cases do not seem to be entirely harmonious. But if the goods were misdirected, or directed to a swindler, the carrier will be justified by delivery according to directions. And so he will if the consignor induces or ratifies the delivery.

§ 287. **Bill of lading.**—The bill of lading is the representative of the goods. To insure safety in delivering the goods the carrier should insist on the presentation of the proper bill of lading by one known to the carrier to be the consignee or his transferee or authorized agent.

§ 288. **Delivery to consignee.**—Presumptively, the consignee is the owner of the goods and therefore ordinarily delivery should be made to him or to his transferee. If delivery is made to any one else the carrier is liable to an action of trover by any rightful holder of the bill of lading. It will however always be sufficient excuse that delivery has been made to the true owner or according to his directions, though contrary to the directions of the bill of lading. But in such case the carrier assumes the burden of proving that he delivered to one having paramount rights.

§ 289. **Interpleader.**—So long as the carrier has reasonable ground for uncertainty as to the proper person to whom delivery should be made he is justified in delaying for proper identification. "Reasonable hesitation in a doubtful matter is not evidence of conversion." If need be resort may be had to the courts to determine by interpleader or otherwise between rival claimants.

§ 287. See Sec. 224, *ante* and the cases there cited, and *Weyand v. Atchison, Topeka & Santa Fe Railway Co.*, 75 Iowa 573, 39 N. W. R. 899, 9 Am. St. R. 504; [121] *Pennsylvania Railroad Co. v. Stern*, 119 Pa. St. 24, 12 Atl. R. 756, 4 Am. St. R. 626; [49] *Shaw v. Railway Co.*, 101 U. S. 557.

§ 288. [122] *Dyer v. Great Northern Railway Co.*, 51 Minn. 345, 53 N. W. R. 714, 38 Am. St. R. 506; [116] *Sweet v. Barney*, 23 N. Y. 335; *Wolfe v. Missouri Pacific Railway Co.*, 97 Mo. 473, 11 S. W. R. 49, 10 Am. St. R. 331;

[121] *Pennsylvania Railroad Co. v. Stern*, 119 Pa. St. 24, 12 Atl. R. 756, 4 Am. St. R. 626.

§ 289. *Wells v. American Express Co.*, 55 Wis. 23, 11 N. W. R. 537, 42 Am. R. 695; *Shellenberg v. Fremont etc. Railroad Co.*, 45 Neb. 487, 63 N. W. R. 859, 50 Am. St. R. 561; [120] *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34, 6 Am. R. 28; *The Idaho*, 93 U. S. 575; *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. D. 359; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. D. 607. Extended note to 91 Am. St. R. 593, *post* sec. 309.

Connecting Carriers.

§ 290. **Delivery to a connecting carrier.**—When goods are received to be carried beyond the terminus of the carrier's line the liability of such carrier is terminated by delivering the goods to the proper connecting carrier. If the shipping receipt names the connecting lines the shipper's directions must be followed. Delivery to a different connecting carrier amounts to a conversion of the goods. If no directions are given, then the customary or most convenient and direct route should be followed. Each carrier beyond its own line is a mere forwarder and is bound to use ordinary care.

§ 291. **Duty to carry beyond carrier's route.**—No carrier is by law compelled to carry goods to points not on its own line. But any carrier may by contract undertake responsibility for the whole transit, including other lines as well as its own. Such undertaking not being imposed by law, must rest upon a contract, express or implied; and if a carrier by custom or traffic arrangements with other lines, or by specific stipulations in its bills of lading, holds itself out to carry beyond its own line it will be liable for a refusal to perform such service.

§ 292. **Partnership arrangements.**—Thus several carriers frequently make joint or partnership arrangements, the effect of which is to create a mutual agency and to make each liable

§ 290. [77] *Briggs v. Boston etc. Railroad Co.*, 6 Allen (Mass.) 246, 83 Am. D. 626; *Robinson v. Baker*, 5 Cush. (Mass.) 137, 51 Am. D. 54; *Johnson v. Transportation Co.*, 33 N. Y. 610, 88 Am. D. 416; *Alabama Great Southern Railroad Co. v. Thomas*, 89 Ala. 294, 7 S. R. 762, 18 Am. St. R. 119; *Knight v. Providence & Worcester Railroad Co.*, 13 R. I. 572, 43 Am. R. 46; *Hadd v. Express Co.*, 52 Vt. 335, 36 Am. R. 757; *Rawson v. Holland*, 59 N. Y. 611, 17 Am. R. 394.

§ 291. *Myrick v. Michigan Central Railroad Co.*, 107 U. S. 102, 1 Sup. Ct. 425; *Hill Manufacturing Co. v. Boston & Lowell Railroad Co.*, 104 Mass. 122, 6 Am. R. 202; *Bird*

v. Railroads, 99 Tenn. 719, 42 S. W. R. 451, 63 Am. St. R. 856; *Perkins v. Portland etc. Railroad Co.*, 47 Me. 573, 74 Am. D. 507; *Grover & Baker Sewing Machine Co. v. Missouri Pacific Railway Co.*, 70 Mo. 672, 35 Am. R. 444; [68] *Illinois Central Railroad Co. v. Frankenberg*, 54 Ill. 88, 5 Am. R. 92; [115] *Bullard v. American Express Co.*, 107 Mich. 695, 65 N. W. R. 551, 61 Am. St. R. 358, 371, note.

§ 292. [123] *Champion v. Bostwick*, 18 Wend. (N. Y.) 175, 31 Am. D. 376; *Fitchburg etc. Railroad Co. v. Hanna*, 6 Gray (Mass.) 539, 66 Am. D. 427; [124] *Nashua Lock Co. v. Worcester & Nashua Railroad Co.*, 48 N. H. 339, 2 Am. R. 242; *Rocky*

for the acts and contracts of all. Such are agreements to divide expenses and profits *pro rata*, to jointly employ common agents, to receive and carry goods and cars on through arrangements. Whether agreements create joint liability is to be determined from the facts of each case. Giving through rates, shipping in a through car, receiving prepayment of freight for the whole route, and receiving goods "to forward" are evidences of such joint arrangements which have been considered sufficient to justify a jury in finding the contract to be one for through transportation.

§ 293. **Goods directed beyond carrier's terminus.**—In England and several of the American states the rule of Muschamp's case is followed, according to which the acceptance of goods directed to a point beyond the carrier's line is *prima facie* evidence of a contract for through transit. In the absence of a contract to the contrary or of facts that deny the presumption, the initial carrier so receiving the goods assumes liability for through transportation. This rule finds its justification in the hardship of compelling the shipper to locate the particular carrier on whose road the loss occurred.

§ 294. **American rule.**—By the great weight of authority in the United States a carrier by the mere acceptance of goods

Mount Mills v. Wilmington etc. Railroad Co., 119 N. C. 693, 25 S. E. R. 854, 56 Am. St. R. 682; Missouri Pacific Railway Co. v. Twiss, 35 Neb. 267, 53 N. W. R. 76, 37 Am. St. R. 437; Bradford v. South Carolina Railroad Co., 7 Rich. L. (S. C.) 201, 62 Am. D. 411. See also the note to 72 Am. D. 238, and compare Irvin v. Nashville etc. Railroad Co., 92 Ill. 103, 34 Am. R. 116, with Hot Springs Railroad Co. v. Trippe, 42 Ark. 465, 48 Am. R. 65.

§ 293. Muschamp v. Lancaster etc. Railway Co., 8 Mees. & W. 421; Erie Railway Co. v. Wilcox, 84 Ill. 239, 25 Am. R. 451; [68] Illinois Central Railroad Co. v. Frankenberg, 54 Ill. 88, 5 Am. R. 92. See also [124] Nashua Lock Co. v. Worcester & Nashua Railroad Co., 48 N. H. 339, 2 Am. R. 242; [125] Quimby

v. Vanderbilt, 17 N. Y. 306, 72 Am. D. 469.

§ 294. [114] McMillan v. Michigan Southern etc. Railroad Co., 16 Mich. 79, 93 Am. D. 208; [125] Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. D. 469; Myrick v. Michigan Central Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425; [124] Nashua Lock Co. v. Worcester & Nashua Railroad Co., 48 N. H. 339, 2 Am. R. 242; Alabama Great Southern Railway Co. v. Thomas, 89 Ala. 294, 7 S. R. 762, 18 Am. St. R. 119; Knight v. Providence & Worcester Railroad Co., 13 R. I. 572, 43 Am. R. 46; Burroughs v. Norwich & Worcester Railroad Co., 100 Mass. 26, 1 Am. R. 78; Hadd v. Express Co., 52 Vt. 335, 36 Am. R. 757. See also Gray v. Jackson, 51 N. H. 9, 12 Am. R. 1.

directed to a point not on its own line undertakes to perform its part of the carriage and to deliver the goods to the next connecting carrier for further transportation. *Prima facie* the responsibility of each carrier is limited to its own line, and delivery to the next connecting line.

§ 295. **Special contract.**—But whatever the rule as to what facts are sufficient to show a through contract, it is settled not only that a carrier may by special contract assume liability for through shipment, but that he may also relieve himself of all liability beyond his own line. Such limitations are inserted in most modern shipping contracts.

Under the American rule the local freight agent has no implied power to make through contracts contrary to the custom and instructions of his principal. Only the general agent has such power.

§ 296. **Carriers agents of the consignor.**—It has been seen that when several carriers form a line under joint arrangements each is the agent of the others for transportation. But when the liability of each carrier is limited to his own line the consignor constitutes each carrier his forwarding agent for whose acts he is liable, and who in turn is liable to him as principal for any failure to follow instructions in forwarding the goods.

§ 297. **What amounts to delivery to a connecting carrier.**—The shipper has a right to understand that the liability as a common carrier is upon some one during the whole period of the transportation. The liability of one carrier is not dis-

- § 295. [124] *Nashua Lock Co. v. Worcester & Nashua Railroad Co.*, 48 N. H. 339, 2 Am. R. 242; [125] *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. D. 469; *Perkins v. Portland etc. Railroad Co.*, 47 Me. 573, 74 Am. D. 507; [107] *Hansen v. Flint & P. M. Railroad Co.*, 73 Wis. 346, 41 N. W. R. 529, 9 Am. St. R. 791; *Wheeler v. San Francisco etc. Railroad Co.*, 31 Cal. 46, 89 Am. D. 147; *Cincinnati etc. Railroad Co. v. Pontius*, 19 Ohio St. 221, 2 Am. R. 391; *Burroughs v. Norwich etc. Railroad Co.*, 100 Mass. 26, 1 Am. R. 78; *Grover & Baker Sewing Machine Co. v. Missouri Pacific Railway Co.*, 70 Mo. 672, 35 Am. R. 444.
- § 296. [77] *Briggs v. Boston & Lowell Railroad Co.*, 6 Allen (Mass.) 246, 83 Am. D. 626; *Johnson v. Transportation Co.*, 33 N. Y. 610, 88 Am. D. 416; *Missouri Pacific Railway Co. v. Twiss*, 35 Neb. 267, 53 N. W. R. 76, 37 Am. St. R. 437; *Halliday v. St. Louis etc. Railway Co.*, 74 Mo. 159, 41 Am. R. 309.
- § 297. [126] *Condon v. Marquette etc. R. R. Co.*, 55 Mich. 218, 21 N. W. R. 321, 54 Am. R. 367; *Irish v. Milwaukee & St. Paul Railway Co.*, 19 Minn. 376, 18 Am. R. 340; *Rawson v. Holland*, 59

charged until that of the next connecting carrier has been assumed; and this does not take place until there is a delivery of the goods to the succeeding carrier, or such a notification as according to the course of business is equivalent to a tender of delivery.

A carrier does not by storing the goods at the end of his own line become a warehouseman, but remains a common carrier of the goods until he has made a proper tender thereof to the succeeding carrier, or has performed such acts as are tantamount to a delivery. Thus he may notify the next carrier that the goods have been placed where such carrier usually receives them, or if such be the custom between the carriers he may leave them without notice. If the connecting carrier refuses to receive them, the first carrier must properly store them and notify the consignor or the consignee.

§ 298. **Presumption as to carrier liable.**—Conditions once proved to have existed are presumed to continue until the contrary is shown, is the principle applied in fastening responsibility for loss when it does not appear on which of several connecting lines the damage was done. *Prima facie* that carrier is liable in whose possession the goods are found in a damaged condition, but in the United States an action can be maintained

N. Y. 611, 17 Am. R. 394; [81] Judson v. Western Railroad Corp., 4 Allen (Mass.) 520, 81 Am. D. 718; Lewis v. Chesapeake & Ohio Railway Co., 47 W. Va. 656, 35 S. E. R. 908, 81 Am. St. R. 816; Gass v. New York etc. Railroad Co., 99 Mass. 220, 96 Am. D. 742; Ladue v. Griffith, 25 N. Y. 364, 82 Am. D. 360; Conkey v. Milwaukee & St. Paul Railway Co., 31 Wis. 619, 11 Am. R. 630; Johnson v. Transportation Co., 33 N. Y. 610, 88 Am. D. 416; Grand Rapids & Indiana Railroad Co. v. Diether, 10 Ind. App. 206, 37 N. E. R. 39, 53 Am. St. R. 385; Goold v. Chapin, 20 N. Y. 259, 75 Am. D. 398.

§ 298. Laughlin v. Chicago & North Western Railway Co., 28 Wis. 204, 9 Am. R. 493; [127] Moore v. New York etc. Railroad Co., 173

Mass. 335, 53 N. E. R. 816, 73 Am. St. R. 298; Shriver v. Sioux City etc. Railroad Co., 24 Minn. 506, 31 Am. R. 353; Cooper v. Georgia Pacific Railway Co., 92 Ala. 329, 9 S. R. 159, 25 Am. St. R. 59; Savannah etc. Railroad Co. v. Harris, 26 Fla. 148, 7 S. R. 544, 23 Am. St. R. 551; [97] Hinkle v. Southern Railway Co., 126 N. C. 932, 35 S. E. R. 810, 78 Am. St. R. 685; [83] Morganton Mfg. Co. v. Ohio River etc. Railway Co., 121 N. C. 514, 28 S. E. R. 474, 61 Am. St. R. 679; Beard v. Illinois Central Railway Co., 79 Iowa, 518, 44 N. W. R. 800, 18 Am. St. R. 381; Texas & Pacific Railway Co. v. Adams, 78 Tex. 372, 14 S. W. R. 666, 22 Am. St. R. 56; Missouri Pacific Railway Co. v. Twiss, 35 Neb. 267, 53 N. W. R. 76, 37 Am. St. R. 437.

against any previous carrier to whose default the loss is due. Under the English rule only the initial carrier can be sued. In any case, if there has been a recovery against one carrier he has an action over against the carrier whose fault caused the injury.

§ 299. Benefit to connecting carrier of contract exemptions.

A connecting carrier is entitled to the benefit of limitations of liability in the shipping contract only when the initial carrier contracted for through transportation, or stipulated that the exemptions in the bill of lading should inure to the benefit of all the carriers engaging in the transportation of the goods. As such contracts are strictly construed no exemptions granted to the initial carrier who undertakes only to receive the goods and deliver them to the next connecting carrier will, by mere implication, be extended to later carriers on the route.

§ 300. Delivery to a warehouseman.—Except in cases where the carrier is bound to make personal delivery it is usually proper to make delivery to a warehouseman. As has already been explained, carriers by boat and by rail have always been allowed to make such delivery, and delivery by a railroad from itself as a common carrier to itself as a warehouseman at the destination of the goods terminates its liability as a common carrier, and substitutes the liability of a warehouseman.

§ 301. —What constitutes delivery to a warehouse so as to terminate liability as a carrier is a question upon which three rules may be noticed, resulting from three views as to the moment when the carrier has performed his full duty as carrier. All agree that when such duty has been fully performed liability as carrier immediately changes to that as warehouseman. These three rules have been ably set forth by the courts of Massachusetts, New Hampshire and Michigan respectively,

§ 299. [114] *McMillan v. Michigan Southern etc. Railroad Co.*, 16 Mich. 79, 93 Am. D. 208; *Bird v. Railroads*, 99 Tenn. 719, 42 S. W. R. 451, 63 Am. St. R. 856; *Maghee v. Camden & Amboy Railroad Co.*, 45 N. Y. 514, 6 Am. R. 124; *Halliday v. St. Louis etc. Railway Co.*, 74 Mo. 159, 41 Am. R. 309; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. R. 574.

§ 300. [113] *Norway Plains Co.*

v. Boston & Maine Railroad Co., 1 Gray (Mass.) 263, 61 Am. D. 423; [112] *Moses v. Boston & Maine Railroad Co.*, 32 N. H. 523, 64 Am. D. 381; *Thomas v. Boston & Providence Railroad Corp.*, 10 Metc. (Mass.) 472, 43 Am. D. 444; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 17 N. E. R. 721, 6 Am. St. R. 350.

and for convenience will be called the Massachusetts, New Hampshire and Michigan rules.

§ 302. — **The Massachusetts rule** is that the duty assumed by the railroad, to which shippers are presumed from their knowledge of that custom to assent, is to carry the goods safely to their destination and there discharge them at their warehouse ready to be taken by the consignee. As soon as the goods are so stored the railroad becomes a warehouseman. If the railroad is not to unload the goods then its duty as carrier ends when the car has been delivered in a convenient position for unloading. This rule has the advantage of being "plain, precise, practical and of easy application." That it is also "well adapted to the security of all persons interested" has been often denied.

§ 303. — **The New Hampshire rule** is that the liability of the railroad as carrier continues until the owner or consignee has actually received the goods, or until he has had a reasonable opportunity after their arrival to inspect and remove them in the common course of business.

The extent of this reasonable opportunity, however, is not to be measured by any peculiar circumstance in the condition and situation of the consignee requiring longer time or better opportunity than if he lived in the vicinity of the warehouse and had adequate facilities for taking the goods away.

§ 304. — **The Michigan rule** declares that "the liability of the carrier continues until the consignee has been notified of the receipt of the goods and has had reasonable time in the

§ 302. [113] *Norway Plains Co. v. Boston & Maine Railroad Co.*, 1 Gray (Mass.) 263, 61 Am. D. 423; *Rice v. Hart*, 118 Mass. 201, 19 Am. R. 433; *Chicago & North Western Railway Co. v. Sawyer*, 69 Ill. 285, 18 Am. R. 613; *Bansemmer v. Toledo & Wabash Railway Co.*, 25 Ind. 434, 87 Am. D. 367; *Gregg v. Illinois Central Railroad Co.*, 147 Ill. 550, 35 N. E. R. 343, 37 Am. St. R. 238; *Gashweiler v. Wabash etc. Railway Co.*, 83 Mo. 112, 53 Am. R. 558; *Independence Mills Co. v. Burlington etc. Railway Co.*, 72 Iowa 535, 34 N. W. R. 320, 2 Am. St. R. 258.

§ 303. [112] *Moses v. Boston & Maine Railroad Co.*, 32 N. H. 523, 64 Am. D. 381; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. D. 349; *Winslow v. Vermont & Massachusetts Railroad Co.*, 42 Vt. 700, 1 Am. R. 365; *Wood v. Crocker*, 18 Wis. 345, 86 Am. D. 773.

§ 304. [114] *McMillan v. Michigan Southern etc. Railroad Co.*, 16 Mich. 79, 93 Am. D. 208; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. R. 574; [111] *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 10 Am. R. 402; *Hutchinson on Carriers*, §§ 373-374.

common course of business to take them away after such notification."

This modification grows out of the uncertainty of the arrival of shipments by freight, and the impracticability of requiring the consignee, who is unwilling to entrust the goods to the railroad as warehouseman, to watch from day to day the arrival of trains. It is more reasonable to require the carrier to give notice to the consignee, and to the carrier himself this is less burdensome than to be subjected to numberless inquiries.

In some of the states some cases are to be found using the language of the Michigan rule, and others using that of the New Hampshire rule, and failing to notice any distinction between the two.

§ 305. Delivery by carriers by water.—Carriers by water have never been required to make personal delivery. If the consignee is not present to receive the goods they may be landed on a proper wharf and notice of their arrival must be sent to the consignee. It is difficult to find any substantial reason for a different rule in case of railroads, and to preserve consistency some courts that excuse the railroad company from giving notice have held that ships running on a regular schedule and having regular warehouses for the delivery of goods are not required to give notice. It is always competent to show usage to make delivery without notice.

§ 306. —Manner of delivery.—A carrier by water does not perform its duty as a carrier by a mere discharge of the goods upon the wharf. The consignee must have a reasonable time after notice of their arrival in which to remove the goods,

In *Shenk v. Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. D. 541, language is used that seems to recognize each of the three rules.

§ 305. *Richardson v. Goddard*, 23 How. (U. S.) 28; [111] *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442, 10 Am. R. 402; [110] *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. R. 1073, 15 Am. St. R. 426; *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 17 N. E. R. 721, 6 Am. St. R. 350; *Gibson v. Culver*, 17 Wend. (N. Y.) 305, 31 Am. D. 297;

Turner v. Huff, 46 Ark. 222, 55 Am. R. 580; *Farmers & Mechanics' Bank v. Chaplain Transportation Co.*, 16 Vt. 52, 42 Am. D. 491, 18 Vt. 131, 23 Vt. 186, 56 Am. D. 68.

§ 306. *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170, 17 N. E. R. 721, 6 Am. St. R. 350; [110] *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. R. 1073, 15 Am. St. R. 426; *Shenk v. Steam Propeller Co.*, 60 Pa. St. 109, 100 Am. D. 541; *Richmond v. Steamboat Co.*, 87 N. Y. 240.

and in the meantime they must not be left by the carrier unprotected in an exposed condition. If the carrier does not remove them within a reasonable time they must be properly stored and not until then is the carrier divested of his responsibility.

The consignee cannot prolong liability by delaying to receive the goods, but neither can he be required to take them on Sunday or a legal holiday or in weather that threatens injury to them. The carrier must deliver them at the usual wharf, or if there be no regular wharf, then at a suitable wharf designated by the consignee, or by a majority of several consignees.

§ 307. Delivery to an elevator.—Some peculiar questions have arisen as to the delivery of grain by a carrier. If there is no designated elevator, and the grain is not at once removed by the consignee, the carrier may leave it in the cars, or store it in a suitable elevator at the risk and expense of the owner. But if the grain is consigned to a particular elevator the carrier must deliver it at that elevator unless it is situated off the line of that carrier. Mandamus will lie against the carrier to compel the performance of this duty, but no carrier can be compelled to carry over lines not owned or controlled by it. In Illinois there are statutes regulating delivery to public elevators.

(2) *Acts Excusing Non-Delivery.*

§ 308. Excepted perils.—Failure to deliver the goods to the consignee will of course be excused if occasioned by any of the excepted perils (sec. 231), or by a cause against which the carrier has contracted in the bill of lading. But even in these cases, as has been seen, the carrier is afforded no excuse if his negligence proximately contributed to the loss (secs. 235 and 237).

§ 309. Paramount owner.—The carrier cannot avail himself of the title of a third person, even the true owner, to keep the

§ 307. *Gregg v. Illinois Central Railroad Co.*, 147 Ill. 550, 35 N. E. R. 343, 37 Am. St. R. 238; [80] *Chicago & Northwestern Railway Co. v. People*, 56 Ill. 365, 8 Am. R. 690; *People v. Chicago & Alton Railroad Co.*, 55 Ill. 95, 8 Am. R. 631.

§ 309. *The Idaho*, 93 U. S. 575; *King v. Richards*, 6 Whart. (Pa.) 418, 37 Am. D. 420; *Wells v. American Express Co.*, 55 Wis. 23, 11 N. W. R. 537, 42 Am. R. 695; *Wolfe v. Missouri Pacific Railway Co.*, 97 Mo. 473, 11 S. W. R. 49, 10 Am. St. R.

property for himself as against the shipper or his consignee or assignee; neither can he of his own motion set up against the bailor such claims of third persons; but when the true owner has demanded his property the carrier is bound to deliver to him, and such delivery to the paramount owner is a complete defense against the claim of the bailor. The carrier however assumes the burden of proving the ownership and right to immediate possession of the third person at the time of the delivery.

The safe course for the carrier who finds himself embarrassed by such conflicting claims is to hold the goods a sufficient time to satisfy his reasonable doubts as to the party to whom delivery should be made. This he has a right to do. The carrier may then deliver the goods to one of the claimants, taking from him a bond of indemnity against loss if the other claim should prove paramount. Or the parties may be compelled to settle their claims by interpleader in court where there are such relations between them as to permit that proceeding. The tendency of modern cases and statutes is to ignore the early requirement of privity between the parties as an essential requisite to the right to a bill of interpleader.

§ 310. **Stoppage in transitu** of the goods may excuse the carrier for non-delivery to the consignee. If a vendor sells goods on credit to a vendee whom he afterwards discovers to be insolvent, he has a right to stop the goods in the hands of the carrier at any time during the transit. For this purpose transit continues until the carrier has surrendered control of the goods to the vendee, or to his *bona fide* transferee of the bill of lading. It is enough if the carrier has consented to keep the goods as bailee of the vendee, but so long as the carrier holds

331; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169, 35 Am. D. 607; *Hutchinson on Carriers*, 404-408, 34 Am. St. R. 731, Note, *ante*, § 289. As to interpleader generally see 91 Am. St. R. 593 and extended note.

§ 310. *Branan v. Atlanta etc. Railroad Co.*, 108 Ga. 70, 33 S. E. R. 836, 75 Am. St. R. 26; [46] *Potts v. New York & New England Railroad Co.*, 131 Mass. 455, 41 Am. R. 247; *Loeb v. Peters*, 63 Ala. 243, 35 Am. R. 17; [78] *Rucker v. Dono-*

van, 13 Kan. 251, 19 Am. R. 84; *Farrell v. Richmond & Danville Railroad Co.*, 102 N. C. 390, 9 S. E. R. 302, 11 Am. St. R. 760; *Sangalaff v. Stix*, 64 Miss. 171, 1 S. R. 97, 60 Am. R. 49; *Brewer v. Boston & Albany Railroad Co.*, 179 Mass. 228, 60 N. E. R. 548, 88 Am. St. R. 375; *Jeffris v. Fitchburg Railroad Co.*, 93 Wis. 250, 67 N. W. R. 424, 57 Am. St. R. 919; *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502, 14 S. E. R. 707, 30 Am. St. R. 164.

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TERMINATION OF THE RELATION. §§ 311-313

the goods to maintain his special lien for the carrying charges, *prima facie* the transit has not ended. The goods are still subject to stoppage.

§ 311. —**Right how exercised.**—Only the vendor or his agent can exercise this right, and it must be exercised against one actually insolvent at the time, though his insolvency may not have been declared. Simple notice to the carrier to hold the goods subject to the vendor's orders is sufficient to bring about the stoppage of the goods. This notice may be to the agent or servant of the carrier in actual possession of the goods, or to any authorized agent of the carrier under such circumstances as to make it reasonably possible to give the necessary orders to the agent in actual possession. The vendor must pay the carrier all charges on the goods, but the carrier cannot hold the goods as security for other unpaid charges of the vendee.

§ 312. —**Improper exercise of the right.**—If the vendee is not really insolvent the vendor is liable in damages for the stoppage, but it is believed the carrier incurs no risk by heeding a notice to hold the goods for the vendor, unless he holds them with knowledge of the solvency of the vendee. As against the vendor the carrier may insist upon reasonable evidence of the validity of his claim.

§ 313. **Inability to find the consignee may furnish an excuse for non-delivery.** He may be dead, absent, or unknown, and

§ 311. [78] Rucker v. Donovan, 13 Am. R. 475; [111] Zinn v. New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. R. 402, The Thames, 14 Wall. (U. S.) 98; Witbeck v. Holland, 45 N. Y. 13, 6 Am. R. 23; Adams Express Co. v. Darnell, 31 Ind. 20, 99 Am. D. 582; Bansemer v. Toledo & Wabash Railway Co., 25 Ind. 434, 87 Am. D. 367; [108] Fisk v. Newton, 1 Denio (N. Y.) 45, 43 Am. D. 649; [109] American Express Co. v. Hockett, 30 Ind. 250, 95 Am. D. 691; Morgan v. Dibble, 29 Tex. 107, 94 Am. D. 264; [110] Scheu v. Benedict, 116 N. Y. 510, 22 N. E. R. 1073, 15 Am. St. R. 426.

§ 312. [128] Allen v. Maine Central Railroad Co., 79 Me. 327, 9 Atl. R. 895, 1 Am. St. R. 310, The Vidette, 34 Fed. R. 396.

§ 313. Price v. Oswego & Syracuse Railway Co., 50 N. Y. 213, 10

the carrier after due efforts may be unable to find him. The carrier may then discharge himself from further responsibility by placing the goods in store with a responsible party to hold as warehouseman for the owner. But the law requires that diligent and careful inquiry be made for the consignee, and if the carrier fails to do this he remains liable as a common carrier. In jurisdictions where railroads are not bound to give notice to the consignee they are of course excused from this duty.

The carrier's duty to deliver and the consignee's duty to receive are reciprocal. The consignee cannot by his act prolong the period of the carrier's liability as a common carrier. If therefore the consignee refuses or fails to accept the goods the carrier's extraordinary liability ceases. However, he is not justified in abandoning the goods or in negligently exposing them to injury, but he becomes charged with the duty of properly storing the goods and notifying the consignor.

PART IV.

OF QUASI-BAILEES.

CHAPTER XIV.

OF CARRIERS OF PASSENGERS.

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| <p>§ 314. Who are quasi-bailees.</p> <p>315. Carriers of passengers.</p> <p style="padding-left: 20px;">1. <i>Nature of the relation.</i></p> <p>316. The parties.</p> <p>317. Common carriers of passengers.</p> <p style="padding-left: 20px;">—Illustrations.</p> <p>319. Passengers.</p> <p>320. —(1) The offer to become a passenger.</p> <p>321. —Special callings.</p> <p>322. —Employees.</p> <p>323. —Payment of fare not necessary.</p> <p>324. —Trespassers.</p> <p>325. —(2) Acceptance by the carrier.</p> <p>326. —What amounts to acceptance.</p> <p style="padding-left: 20px;">2. <i>Rights and duties resulting from the relation.</i></p> <p>327. Classification.</p> <p style="padding-left: 20px;">A. <i>By operation of law.</i></p> <p style="padding-left: 40px;">(1) <i>Right to compensation.</i></p> <p>328. Fare.</p> <p>329. —Amount of fare.</p> <p>330. —Tickets.</p> <p>331. —Sale of tickets.</p> <p>332. —Nature of ticket.</p> <p>333. —Ticket as a contract.</p> <p>334. —Ticket as between passenger and conductor.</p> | <p>§ 335. ———Tickets ambiguous on face.</p> <p>336. ———Basis of carrier's liability.</p> <p>337. ———Conditions printed on ticket.</p> <p>338. ———Stop-overs, coupon tickets.</p> <p>339. ———Limited tickets.</p> <p style="padding-left: 20px;">(2) <i>Right to make regulations.</i></p> <p>340. Basis of right.</p> <p>341. Must be reasonable.</p> <p>342. —What regulations reasonable.</p> <p>343. —Ejection of passengers for breach.</p> <p style="padding-left: 20px;">(3) <i>Duty to accept all.</i></p> <p>344. Common carriers of passengers.</p> <p>345. Carrier may refuse to accept.</p> <p style="padding-left: 20px;">(4) <i>Duty to furnish accommodations.</i></p> <p>346. Equal accommodations.</p> <p>347. Means of conveyance.</p> <p>348. Roadbeds, bridges, etc.</p> <p>349. Latest improvements.</p> <p>350. Agents and servants.</p> <p>351. Stational facilities.</p> <p style="padding-left: 20px;">(5) <i>Liability for injuries to passengers.</i></p> <p>352. Measure of diligence.</p> |
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| <p>§ 353. —As far as human care and foresight will go.</p> <p>354. —Gratuitous passenger.</p> <p>355. Contributory negligence.</p> <p>356. —What amounts to contributory negligence.</p> <p>357. —Illustrations.</p> <p>358. —Proximate cause.
<i>Sleeping car companies.</i></p> <p>359. Not common carriers.</p> <p>360. Nature of their undertaking.</p> <p>361. Their liability.
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(2) <i>Contract to carry left incomplete.</i></p> <p>375. (a) The passenger may leave.</p> <p>376. (b) Carrier may eject passenger.</p> |
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§ 314. **Who are quasi-bailees.**—There are several classes of carriers whose callings are public or nearly so, but who are not carriers of goods. Such are *carriers of passengers*, including sleeping car companies and owners of passenger elevators, *carriers of news*, such as telegraph and telephone companies, and *carriers of mail*. The Post Office Department carries goods as well as news, but as it is a department of the government and therefore cannot be sued it is scarcely to be regarded as a real bailee for hire.

The undertakings of all these carriers, however, are in their nature so like those of bailees for hire that a consideration of their legal status is most naturally found in connection with the work on Bailments and Carriers. With no other branch of commercial law have they any close relations, but they may very properly be called quasi-bailees. The passenger carrier as to the baggage of the passenger is of course a bailee, a common carrier of goods.

§ 315. **Carriers of passengers** are either *private* or *common carriers*. As the undertaking involves the safety of human life they are required to exercise a degree of care commensurate with such a responsibility. Except for this a private carrier

of passengers is subject to no liabilities that call for special mention here, and the present chapter will be devoted to *common carriers of passengers*, taking up 1. the nature of the relation; 2. its rights and duties; and 3. its termination.

1. THE NATURE OF THE RELATION.

§ 316. **The parties.**—It is first necessary in questions arising over the carrying of human beings to know who are *common carriers of passengers* and who are *passengers*. The relations of passengers and non-passengers to carriers rest on very different principles of law, and give rise to widely different liabilities.

§ 317. **Common carriers of passengers** are such as hold themselves out for hire to carry all persons indifferently who apply for passage.

The distinction here, as in the case of carriers of goods, between private and public carriers, lies in the public profession, the undertaking to carry all indifferently who apply.

§ 318. —**Illustrations.**—Contractors running construction trains, lumbermen operating logging trains, railroads as to freight trains, owners of conveyances occasionally loaned or hired to carry persons, and sleeping car companies, are not common carriers of passengers. They may, of course, by offering as a business to carry indiscriminately any who apply, become common carriers. They are such if they habitually keep coaches to carry by highway or rail, or boats to carry by water, such persons as present themselves for carriage.

§ 319. **Passengers.**—Passengers are persons who present themselves for the purpose of being carried and who are accepted by the carrier.

§ 317. *Shoemaker v. Kingsbury*, 12 Wall. (U. S.) 369; [65] *Thompson-Houston Electric Co. v. Simon*, 20 Ore. 60, 25 Pac. R. 147, 23 Am. St. R. 86.

§ 318. [65] *Thompson-Houston Electric Co. v. Simon*, 20 Ore. 60, 25 Pac. R. 147, 23 Am. St. R. 86; *Houston & Texas Central Railway Co. v. Moore*, 49 Tex. 31, 30 Am. R. 98; [54] *Blum v. Pullman Palace Car Co.*, 1 Flap. (U. S.) 500; *Gardner v. New Haven etc. Co.*, 51 Conn. 143, 50 Am. R. 12; [129] *Hoar v. Maine Central Railroad Co.*, 70 Me. 65, 35 Am. R. 299; *Murch v. Concord Railroad Corp.*, 29 N. H. 9, 61 Am. D. 631; *Siegrist v. Arnot*, 86 Mo. 200, 56 Am. R. 425. Compare *Dunn v. Grand Trunk Railway Co.*, 58 Me. 187, 4 Am. R. 267, and *Eaton v. Delaware, Lackawanna & Western Railroad Co.*, 57 N. Y. 382, 15 Am. R. 513.

The relation of passenger and carrier rests upon a contract, express or implied. Therefore two essentials are to be noted:

(1). There must on one side be an offer to become a passenger.

(2). There must on the other be an acceptance of the offer by the carrier, either expressly or impliedly.

§ 320. —(1) **The offer to become a passenger** is usually to be implied from the circumstances. The traveler must put himself under the control of the carrier for the purpose of being carried. This he does if he enters the carrier's premises, waiting room, or vehicle, with the intention in good faith, and within a reasonable time, of becoming a passenger; or if the carrier sends a vehicle to bring passengers to its station and he is riding in such a vehicle for the purpose of becoming a passenger he is ordinarily regarded as a passenger. As soon as he has put himself in control of the carrier in the usual way provided by the carrier, he has so far offered himself as a passenger as to become such, unless there is some act of refusal on the part of the carrier.

§ 321. —**Special callings.**—Many persons, not employees of the carrier, ride for the purpose of performing some service or carrying on some business upon the boat or train. Such are mail clerks, express and news agents, and the like, who per-

§ 319. *Higley v. Glimmer*, 3 Mont. 90, 35 Am. R. 450; [130] *Bricker v. Philadelphia & Reading Railroad Co.*, 132 Pa. St. 1, 18 Atl. R. 983, 19 Am. St. R. 585; *Chicago & Erie Railroad Co. v. Field*, 7 Ind. App. 172, 34 N. E. R. 406, 52 Am. St. R. 444; *Illinois Central Railroad Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. R. 294, 61 Am. St. R. 68, and extended note.

§ 320. [131] *Warren v. Fitchburg Railroad Co.*, 8 Allen (Mass.) 227, 85 Am. D. 700; *Webster v. Fitchburg Railroad Co.*, 161 Mass. 298, 37 N. E. R. 165; *Chicago & Erie Railroad Co. v. Field*, 7 Ind. App. 172, 34 N. E. R. 406, 52 Am. St. R. 444; *Hansley v. Jamesville etc. Railroad Co.*, 115 N. C. 602, 20 S. E. R. 528,

44 Am. St. R. 474; *Illinois Central Railroad Co. v. O'Keefe*, 168 Ill. 115, 48 N. E. R. 294, 61 Am. St. R. 68, and extended note; *Gardner v. New Haven etc. Co.*, 51 Conn. 143, 50 Am. R. 12.

§ 321. *Union Pacific Railway Co. v. Nichols*, 8 Kan. 505, 12 Am. R. 475; *Gulf etc. Railway Co. v. Wilson*, 79 Tex. 371, 15 S. W. R. 280, 23 Am. St. R. 345; [132] *Magoffin v. Missouri Pacific Railway Co.*, 102 Mo. 540, 15 S. W. R. 76, 22 Am. St. R. 798; *Brewer v. New York etc. Railroad Co.*, 124 N. Y. 59, 26 N. E. R. 324, 21 Am. St. R. 647; *Cleveland etc. Railway Co. v. Ketcham*, 133 Ind. 346, 33 N. E. R. 116, 36 Am. St. R. 550; *Commonwealth v. Vermont & Massachusetts Railroad Co.*,

form a service for an employer who pays the carrier for permission to carry on a business and to have his clerks or agents transported on the train or boat to take charge thereof. It is generally held that persons performing such services and traveling with the consent of the carrier are not employees of the carrier, but are passengers, or as some cases put it, are to be treated with the same care as passengers. It is of no consequence that their fare is paid by a third person, or that it is part of the charge paid the carrier for permission to carry on the business, or that no compensation is paid for the carriage of such persons. If they are lawfully on the train and entitled to ride, they are passengers.

§ 322. — Employees of the carrier are not passengers if they are riding while engaged in the service for which they were employed, or are traveling free of charge to and from their work. But an employee may be a passenger, and he is generally regarded as such, if he travels when not about his duties to the carrier, or if before and after his hours of employment for his own private interest or pleasure he rides to and from his work on a ticket that forms part of the consideration by which he was induced to enter the employment of the carrier. To its servants the carrier owes the duty to use due diligence in selecting fellow servants, but does not guarantee against the negligence of such fellow servants when properly selected.

§ 323. — Payment of fare is not necessary to make one a

108 Mass. 7, 11 Am. R. 301; Seybolt v. New York etc. Railroad Co., 95 N. Y. 562, 47 Am. R. 75.

Contra as to express messengers: Baltimore & Ohio etc. Railway Co. v. Voigt, 176 U. S. 498; Peterson v. Chicago & Northwestern Railway Co., — Wis. —, 96 N. W. R. 532.

§ 322. Vick v. New York Central Railroad Co., 95 N. Y. 267, 47 Am. R. 36; [133] Doyle v. Fitchburg Railroad Co., 162 Mass. 66, 37 N. E. R. 770, 44 Am. St. R. 335, 166 Mass. 492, 55 Am. St. R. 417; Dickinson v. West End Street Railway Co., 177 Mass. 365, 59 N. E. R. 60, 83 Am. St. R. 284; O'Donnell v.

Allegheny Valley Railroad Co., 59 Pa. St. 239, 98 Am. D. 336; [134] Williams v. Oregon Short Line Railroad Co., 18 Utah, 210, 54 Pac. R. 991, 72 Am. St. R. 777; Ionnone v. New York etc. Railroad Co., 21 R. I. 452, 44 Atl. R. 592, 79 Am. St. R. 812; [135] Steamboat New World v. King, 16 How. (U. S.) 469; McNulty v. Pennsylvania Railroad Co., 182 Pa. St. 479, 38 Atl. R. 524, 61 Am. St. R. 721; [129] Hoar v. Maine Central Railroad Co., 70 Me. 65, 35 Am. R. 299.

§ 323. [136] Philadelphia & Reading Railroad Co. v. Derby, 14 How. (U. S.) 468; [103] Railroad

passenger. The carrier may refuse to carry without compensation, but if that right be waived the only inquiry is whether the person was lawfully on the train. If the carrier accepts the duty of carrying a human being that duty can not be affected by the payment or non-payment of fare. Though the relation of carrier and passenger rests upon contract, the duty of the carrier toward human life does not rest upon contract, but is imposed by law.

§ 324. —**Trespassers.**—But toward a mere trespasser the carrier owes no duty except to refrain from any wilful injury. One who boards a train without the knowledge or consent of the carrier, intending to steal a ride or in any manner to defraud the carrier of full compensation, is not a passenger, but a trespasser. And if by collusion with trainmen, or even with the conductor, he secures permission to ride free, or for less than the full fare, he is no passenger. Wrongful collusion with an agent can give no right against his principal.

§ 325. (2) **Acceptance by the carrier.**—As the relation of carrier and passenger can arise only from a contract, it follows that one can not become a passenger until he is accepted by the carrier. Acceptance is usually implied from the act

v. Lockwood, 17 Wall. (U. S.) 357, 10 Am. R. 366; Ohio & Mississippi Railroad Co. v. Muhling, 30 Ill. 9, 81 Am. D. 336; [134] Williams v. Oregon Short Line Railroad Co., 18 Utah 210, 54 Pac. R. 991, 72 Am. St. R. 777; Illinois Central Railroad Co. v. Beebe, 174 Ill. 13, 50 N. E. R. 1019, 66 Am. St. R. 253; [129] Hoar v. Maine Central Railroad Co., 70 Me. 65, 35 Am. R. 299; Russell v. Pittsburg etc. Railway Co., 157 Ind. 305, 61 N. E. R. 678, 87 Am. St. R. 214; Union Pacific Railway Co. v. Nichols, 8 Kan. 505, 12 Am. R. 475; Lemon v. Chanslor, 68 Mo. 340, 30 Am. R. 799. Compare Higley v. Gilmer, 3 Mont. 90, 35 Am. R. 450.

§ 324. [130] Bricker v. Philadelphia & Reading Railroad Co., 132 Pa. St. 1, 18 Atl. R. 983, 19 Am. St. R. 585; McVeety v. St. Paul etc.

Railway Co., 45 Minn. 268, 47 N. W. R. 809, 22 Am. St. R. 728; Higley v. Gilmer, 3 Mont. 90, 35 Am. R. 450; Toledo etc. Railway Co. v. Beggs, 85 Ill. 80, 28 Am. R. 613; Louisville etc. Railway Co. v. Thompson, 107 Ind. 442, 8 N. E. R. 18, 57 Am. R. 120; Way v. Chicago, Rock Island & Pacific Railroad Co., 64 Iowa 48, 19 N. W. R. 828, 52 Am. R. 431; Padgitt v. Moll, 159 Mo. 143, 60 S. W. R. 121, 81 Am. St. R. 347; Chicago & Erie Railroad Co. v. Field, 7 Ind. App. 172, 34 N. E. R. 406, 52 Am. St. R. 444; Illinois Central Railroad Co. v. O'Keefe, 168 Ill. 115, 48 N. E. R. 294, 61 Am. St. R. 68, note.

§ 325. [130] Bricker v. Philadelphia & Reading Railroad Co., 132 Pa. St. 1, 18 Atl. R. 983, 19 Am. St. R. 585; Higley v. Gilmer, 3 Mont. 90, 35 Am. R. 450; Chicago & Erie

of the passenger in putting himself in the control of the carrier in the manner usually provided by the carrier for its passengers. The carrier rarely expressly accepts the passenger as such until after the carriage has begun, but the relation dates from the implied acceptance when the passenger properly presents himself for carriage.

§ 326. —What amounts to acceptance.—The carrier is in general presumed to have accepted as passengers all who offer themselves in the usual way for carriage, whether the carrier has knowledge of such offer or not. Entering a station with the intention of purchasing a ticket for immediate transportation, or boarding a train with or without a ticket with the intention of paying for the ride when called upon, ordinarily makes one a passenger, and so does signaling a bus to stop for a pedestrian if the driver heeds the signal and stops the bus. But running to catch a train, boarding a train not used for carrying passengers, or a passenger train in a part of the train not used for passengers, or riding in the cab of the engine with the consent of the engineer, are not acts from which the carrier's acceptance of the person as a passenger will be presumed.

2. RIGHTS AND DUTIES RESULTING FROM THE RELATION.

§ 327. **Classification.**—The rights and liabilities of the passenger carrier are fixed.

- A. By operation of law; or
- B. By contract.

Railroad Co. v. Field, 7 Ind. App. 172, 34 N. E. R. 406, 52 Am. St. R. 444; [129] Hoar v. Maine Central Railroad Co., 70 Me. 65, 35 Am. R. 299; Illinois Central Railroad Co. v. O'Keefe, 168 Ill. 115, 48 N. E. R. 294, 61 Am. St. R. 68.

§ 326. [137] Brien v. Bennett, 8 Car. & P. 724, 34 E. C. L. 984; Carpenter v. Boston & Albany Railroad Co., 97 N. Y. 494, 49 Am. R. 540; Union Pacific Railway Co. v. Nichols, 8 Kan. 505, 12 Am. R. 475; [131] Warren v. Fitchburg Railway Co., 8 Allen (Mass.) 227, 85 Am. D. 700; Hansley v. Jamesville etc. Railroad Co., 115 N. C. 602, 20 S. E.

R. 528, 44 Am. St. R. 474; Merrill v. Eastern Railroad Co., 139 Mass. 238, 1 N. E. R. 548, 52 Am. R. 705; [130] Bricker v. Philadelphia & Reading Railroad Co., 132 Pa. St. 1, 18 Atl. R. 983, 19 Am. St. R. 585; Illinois Central Railroad Co. v. O'Keefe, 168 Ill. 115, 48 N. E. R. 294, 61 Am. St. R. 68; Gardner v. New Haven etc. Co., 51 Conn. 143, 50 Am. R. 12; Eaton v. Delaware, Lackawanna & Western Railroad Co., 57 N. Y. 382, 15 Am. R. 513; Udell v. Citizens' Street Railroad Co., 152 Ind. 507, 52 N. E. R. 799, 71 Am. St. R. 336.

A. *By operation of law* the carrier of passengers has the following rights and duties:

- (1) Right to compensation.
- (2) Right to make reasonable regulations.
- (3) Duty to accept all as passengers.
- (4) Duty to furnish accommodations.
- (5) Liability for injury to the passenger.
- (6) Liability for delay in transportation.
- (7) Liability for passenger's baggage.

(1) *Right to Compensation.*

§ 328. **Fare.**—Like every carrier the common carrier of passengers has a right to compensation for his services, and may demand his payment in advance. It is usual to do this by requiring the purchase of a ticket before entering the cars or other vehicle. The rules already stated as to compensation of the common carrier of goods apply to the compensation of the common carrier of passengers, except that the latter is equally a carrier of passengers who pay and of those who ride gratuitously with the carrier's consent.

§ 329. —**Amount of fare.**—In the case of the great corporations engaged in carrying passengers by land, the fare is often fixed by charter or statute. When not so regulated the customary rate, or in the absence of usage, a reasonable amount may be charged. The charge must be uniform to all persons of the same class riding under the same conditions.

§ 330. —**Tickets** purchased by the passenger showing the route and train for which passage has been paid are in universal use. Such tickets are evidence of the passenger's right to ride, and they are often used as a contract containing printed stipulations as to the special terms under which the carriage is undertaken, both of the passenger and of his baggage. (See Sec. 333.)

§ 328. See the cases under sec. 323; *Hutchinson on Carriers*, sec. 565; *Barrett v. Market Street Railway Co.*, 81 Cal. 296, 22 Pac. R. 859, 15 Am. St. R. 61; [138] *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. R. 66; [139] *O'Brien v. Boston etc. Railroad*, 15 Gray (Mass.) 20, 77 Am.

D. 347; *Lynch v. Metropolitan Elevated Railway Co.*, 90 N. Y. 77, 43 Am. R. 141; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. R. 232.

§ 329. *Ante*, sec. 202-203; *Spofford v. Railroad Co.*, 128 Mass. 326; *Wellman v. Railway Co.*, 83 Mich. 592, 47 N. W. R. 489; *Hutchinson on Carriers*, sec. 567a.

§ 331. — **Sale of tickets.**—As already stated, the carrier may require the purchase of a ticket as a prerequisite to the right to ride. Passengers who fail to comply may be ejected from the train, or required to pay a higher fare on the train, provided this higher fare be not in excess of the amount the carrier is permitted to charge.

But the carrier must afford passengers reasonable opportunities to procure tickets. The ticket office must be open for a reasonable time before the train starts, or at least before the schedule time for its departure, and tickets must be sold indifferently to all who apply. If the fault of the carrier prevents the passenger from procuring a ticket he is entitled to ride by paying the lower fare on the train, and if he is ejected for a refusal to pay the higher charge the carrier is liable for the damages caused thereby.

§ 332. — **Nature of ticket.**—The ticket is evidence that the passenger has paid his fare, and must therefore be produced whenever called for by the conductor. One who refuses to produce his ticket, or who has lost or mislaid it, can

§ 331. *McGowen v. Morgan's Railroad & Steamship Co.*, 41 La. 732, 6 S. R. 606, 17 Am. St. R. 415; [140] *Zagelmeyer v. Cincinnati, Saginaw & Mackinaw Railroad Co.*, 102 Mich. 214, 60 N. W. R. 436, 47 Am. St. R. 514; [141] *O'Rourke v. Citizens' Street Railway Co.*, 103 Tenn. 124, 52 S. W. R. 872, 76 Am. St. R. 639; *Poole v. Northern Pacific Railroad Co.*, 16 Ore. 261, 19 Pac. R. 107, 8 Am. St. R. 289; *Reese v. Pennsylvania Railroad Co.*, 131 Pa. St. 422, 19 Atl. R. 72, 17 Am. St. R. 818; *Du Laurans v. St. Paul & Pacific Railroad Co.*, 15 Minn. 49, 2 Am. R. 102; *Chicago, Burlington & Quincy Railroad Co. v. Parks*, 18 Ill. 460, 68 Am. D. 562; [142] *Forsee v. Alabama Great Southern Railroad Co.*, 63 Miss. 66, 56 Am. R. 801; *Everett v. Chicago, Rock Island & Pacific Railroad Co.*, 69 Iowa 15, 28 N. W. R. 410, 58 Am. R. 207; *St. Louis etc. Railroad Co. v. South*, 43 Ill. 176, 92 Am. D. 103; *Jeffer-*

sonville Railroad Co. v. Rogers, 28 Ind. 1, 92 Am. D. 276; *Swan v. Manchester etc. Railroad Co.*, 132 Mass. 116, 42 Am. R. 432.

§ 332. [102] *Ranchau v. Rutland Railroad Co.*, 71 Vt. 142, 76 Am. St. R. 761; *Mahoney v. Detroit Street Railway Co.*, 93 Mich. 612, 53 N. W. R. 793, 32 Am. St. R. 528; *Jerome v. Smith*, 48 Vt. 230, 21 Am. R. 125; *Townsend v. New York Central Railroad Co.*, 56 N. Y. 295, 15 Am. R. 419; [138] *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. R. 66; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. R. 232; *Van Kirk v. Pennsylvania Railroad Co.*, 76 Pa. St. 66, 18 Am. R. 404. But see also *Maples v. New York & New Haven Railroad Co.*, 38 Conn. 557, 9 Am. R. 434; *Illinois Central Railroad Co. v. Whittemore*, 43 Ill. 420, 92 Am. D. 138; *Jeffersonville Railroad Co. v. Rogers*, 38 Ind. 116, 10 Am. R. 103.

be required to pay full fare on the train on penalty of ejection for refusal so to do. The conductor may require the passenger to surrender his ticket, but not without giving him instead a check or other evidence of his right to ride.

§ 333. —**Ticket as a contract.**—The ordinary passenger ticket is not a contract, but mere evidence of a contract, a receipt or token given by the carrier to show its trainmen for what right the passenger has paid. In this it differs from a bill of lading which is ordinarily both a receipt and a contract. If therefore the carrier embodies in the ticket elements of the contract of carriage the purchaser does not by mere acceptance of the ticket assent to terms printed thereon, in the absence of actual knowledge of them.

His acquiescence may be assumed when he knows he is buying a ticket at reduced rates and the terms are plainly printed on the ticket, or when he signs stipulations so printed without taking the trouble to read them, but in any case the conditions will not be binding unless they are reasonable.

It is the contract, not the ticket, that governs the right to transportation, and it is seldom, if ever, that the ticket embodies all the elements of the contract. But when the circumstances are such that the passenger must be understood to have assented to conditions on the ticket they become part of the contract of carriage. If the ticket does not express the full contract, parol evidence is admissible to supply missing terms.

§ 334. —**As between the passenger and the conductor the**

- § 333. [102] *Ranchau v. Rutland E. R.* 424, 51 Am. St. R. 206; *Railroad Co.*, 71 Vt. 142, 43 Atl. R. 11, 76 Am. St. R. 761; [125] *Quimby v. Vanderbilt*, 17 N. Y. 306, 72 Am. D. 469; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. R. 665, 25 Am. St. R. 660; *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. R. 841, 68 Am. St. R. 146; [143] *Kent v. Baltimore & Ohio Railroad Co.*, 45 Ohio St. 284, 12 N. E. R. 798, 4 Am. St. R. 539; *Kansas City etc. Railroad Co. v. Rodebaugh*, 38 Kan. 45, 15 Pac. R. 899, 5 Am. St. R. 715; *Louisville etc. Railway Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. R. 424, 51 Am. St. R. 206; [144] *Pennsylvania Railroad Co. v. Parry*, 55 N. J. L. 551, 27 Atl. R. 914, 39 Am. St. R. 654; *Walker v. Price*, 62 Kan. 327, 62 Pac. 1001, 84 Am. St. R. 392; *Burnham v. Grand Trunk Railway Co.*, 63 Me. 298, 18 Am. R. 220; *Callaway v. Mellett*, 15 Ind. App. 366, 44 N. E. R. 198, 57 Am. St. R. 238; [141] *O'Rourke v. Citizens' Street Railway Co.*, 103 Tenn. 124, 52 S. W. R. 872, 76 Am. St. R. 639.
- § 334. [145] *Frederick v. Marquette etc. Railroad Co.*, 37 Mich. 342, 26 Am. R. 531; *Bradshaw v.*

ticket is conclusive of the passenger's right to ride. On a ticket reading from A to B one may not ride from B to A, nor from A to C beyond B. As to that conductor it does not matter that the mistake in the ticket was the fault of the ticket agent who sold it. The conductor must be guided by the ticket or the carrier would be at the mercy of every fraudulent representation of a passenger. The passenger with a wrong ticket should pay his fare again, taking a receipt. He may then recover from the carrier all the damage proximately caused by the fault of the ticket agent.

§ 335. —**Tickets ambiguous on their face** have led the courts in some cases to relax the above rule, with a resulting uncertainty that seems unfortunate and not always in accord with reason and the conditions under which a conductor acts in taking tickets. Thus, where a passenger through the fault of the agent or carrier is unable to procure a proper ticket, or has been given a ticket which does not show upon its face that it is defective, it has been held that the conductor must accept the passenger's statement until he knows the contrary to be true. The cases on this question are in conflict, but the clear tendency of recent cases is toward holding the carrier liable for ejecting a passenger presenting such a ticket.

§ 336. —**Basis of carrier's liability.**—It is possible that the conflicting rules result from a failure to distinguish between the right of the conductor and the liability of the carrier. By the weight of reason, and it is believed of authority

South Boston Railroad Co., 135 Mich. 631, 31 N. W. R. 544, 8 Am. Mass. 407, 46 Am. R. 481; McKay St. R. 859. (Compare *id.* 53 Mich. v. Ohio River Railroad Co., 34 W. 118, 18 N. W. R. 580.) [141] O'Rourke v. Citizens' Street Railway Co., 103 Tenn. 124, 52 S. W. R. 872, 76 Am. St. R. 639; Kansas City etc. Railroad Co. v. Riley, 68 Miss. 765, 9 S. R. 443, 24 Am. St. R. 309; Head v. Georgia Pacific Railway Co., 79 Ga. 358, 7 S. E. R. 217, 11 Am. St. R. 434; Murdock v. Boston & Albany Railroad Co., 137 Mass. 293, 50 Am. R. 307.

§ 336. Appleby v. St. Paul City Railway Co., 54 Minn. 169, 55 N. W. R. 1117, 40 Am. St. R. 308; Louisville & Nashville, Railroad Co. v. Gaines, 99 Ky. 411, 36 S. W. R.

§ 335. [146] Hufford v. Grand Rapids & Indiana Railroad Co., 64

also, the conductor must be guided by the ticket, and is guilty of no wrong in ejecting a passenger for failure to present a proper ticket and refusal to pay full fare.

But the carrier is equally liable for the acts of the conductor and of the ticket agent. If, therefore, through the negligence or wrong of such agent the passenger is not furnished with a proper ticket the carrier is liable for the natural and proximate consequences. The passenger may pay his fare again and recover back the extra amount so paid; but he is not bound to do so, and if he refuses and is ejected from the train the carrier is liable not only for the amount of the fare, but for other losses proximately caused by the negligence of the agent, but not, it is believed, for injuries caused by resisting ejection from the train, unless the passenger was wantonly and maliciously injured by the trainmen. The passenger recovers, but his recovery is based on the wrong of the ticket agent and not on that of the conductor. This distinction in some cases has an important bearing on the form of the action and the amount of the damages.

§ 337. — **Conditions printed on the ticket bind the passenger** if they are reasonable and not contrary to public policy. But the ticket is a mere token that the fare is paid and that the passenger has a right to be carried to the destination indicated in the ticket according to the reasonable regulations of the company. Both the regulations on the ticket and other regulations of the carrier, at least so far as they are presumed to be known, are part of the contract of carriage, and the passenger must conform to them.

§ 338. — **Stop-overs, coupon tickets.**—Presumptively a ticket is evidence of a right to a continuous passage to the

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| <p>174, 59 Am. St. R. 465; Kiley v. Chicago City Railway Co., 189 Ill. 384, 59 N. E. R. 794, 82 Am. St. R. 460; [141] O'Rourke v. Citizens' Street Railway Co., 103 Tenn. 124, 52 S. W. R. 872, 76 Am. St. R. 639; Atchison, Topeka & Santa Fe Railroad Co. v. Gants, 38 Kan. 608, 17 Pac. R. 54, 5 Am. St. R. 780, 2 Mich. L. Rev. 140.</p> | <p>McClure v. Philadelphia etc. Railroad Co., 34 Md. 532, 6 Am. R. 345.</p> |
| <p>§ 337. [144] Pennsylvania Railroad Co. v. Parry, 55 N. J. L. 551, 27 Atl. R. 914, 39 Am. St. R. 654;</p> | <p>§ 338. [144] Pennsylvania Railroad Co. v. Parry, 55 N. J. L. 551, 27 Atl. R. 914, 39 Am. St. R. 654; Cheney v. Boston & Maine Railroad Co., 11 Metc. (Mass.) 121, 45 Am. D. 190; Spencer v. Lovejoy, 96 Ga. 657, 23 S. E. R. 836, 51 Am. St. R. 152; [147] Auerbach v. New York Central Railroad Co., 89 N. Y. 281, 42 Am. R. 290; McClure v. Philadelphia etc. Railroad Co., 34 Md. 532,</p> |

destination therein named, and the passenger has no right to break the journey by stopping off unless the carrier specially grants stop-over privileges. The contract is entire, and neither party can be required to perform it in fragments. Where, however, the passage is over several lines, or several branches of the same line, and a coupon ticket is given, each coupon is a sort of separate contract over that division of the route, and the passenger may leave the train at junction points and resume his journey by a later train.

§ 339. —**Limited tickets.**—There is nothing unreasonable in limiting a ticket to be “good only on date of sale,” “good only two days from date stamped on back,” “not good on limited trains.” If one asks for an inferior ticket at a reduced rate he is presumed to accept the conditions printed thereon as part of the contract of carriage. If, however, a first class unlimited ticket is paid for the passenger is bound only by conditions of which he had notice, and if a second class ticket is issued to him the carrier is liable if he is denied the full advantages of a first class ticket. It has been held that a time limitation is not matter of contract, but is a mere regulation of which the passenger must take notice.

Tickets limited as to time of use are not good after the expiration of such time. The journey must be begun, though not necessarily completed, before the expiration of such time limit. In the case of coupon tickets the journey over the portion of the route covered by the last coupon must have been entered upon, but not necessarily completed, within the limit.

6 Am. R. 345; *State v. Overton*, 4 note; *Burnham v. Grand Trunk* Zab. (N. J.) 435, 61 Am. D. 671; *Railway Co.*, 63 Me. 298, 18 Am. R. 220; *Louisville & Nashville Railroad Co. v. Gaines*, 99 Ky. 411, 36 S. W. R. 174, 59 Am. St. R. 465;

§ 339. [148] *Boston & Lowell Railroad Co. v. Proctor*, 1 Allen (Mass.) 267, 79 Am. D. 729; *Hefron v. Detroit City Railway Co.*, 92 Mich. 406, 52 N. W. R. 802, 31 Am. St. R. 601; *Elmore v. Sands*, 54 N. Y. 512, 13 Am. R. 617; *McClure v. Philadelphia etc. Railroad Co.*, 34 Md. 532, 6 Am. R. 345; *Keeley v. Boston & Maine Railroad Co.*, 67 Me. 163, 24 Am. R. 19; *Walker v. Price*, 62 Kan. 327, 62 Pac. R. 1001, 84 Am. St. R. 392, and extended 245.

[102] *Ranchau v. Rutland Railroad Co.*, 71 Vt. 142, 43 Atl. R. 11, 76 Am. St. R. 761. Compare *Coburn v. Morgan's Railroad Co.*, 105 La. 398, 29 S. R. 882, 83 Am. St. R. 242, with *Boyd v. Spencer*, 103 Ga. 828, 30 S. E. R. 841, 68 Am. St. R. 146; [147] *Auerbach v. New York Central Railroad Co.*, 89 N. Y. 281, 42 Am. R. 290; *Cleveland etc. Railway Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. R. 169, 87 Am. St. R. 245.

(2) *Right to Make Regulations.*

§ 340. **Basis of the right.**—It is not only the right, but also the duty, of passenger carriers to make and enforce reasonable rules and regulations for the safety and comfort of their passengers. Particularly in the case of carriers using steam as a motive power, public convenience and safety require such rules as to the manner of doing their business as carriers and as to the conduct of their passengers as shall ensure a service that is swift, regular and safe.

For the enforcement of such rules and regulations the law gives the carrier ample authority. Derangement in the running of trains is hazardous to property and life, and a passenger whose conduct causes such derangement forfeits his right to ride. Every passenger therefore impliedly agrees to be bound by the reasonable regulations of the carrier.

§ 341. **~~Must be reasonable.~~**—While these reasonable regulations are part of the contract, expressed or implied, for the carriage, and while the carrier may, if necessary, resort to force to compel obedience to them, yet he assumes the risk of being liable in damages to the passenger if he resorts to extreme measures to enforce regulations that are unreasonable and unnecessary. The reasonable regulations may apply to the station or to any part of the journey, to the passenger on or off the train. But it must be their purpose to facilitate the service and to secure the just rights of the parties, and not

§ 340. *Hibbard v. Erie Railroad Co.*, 15 N. Y. 455; [139] *O'Brien v. Boston etc. Railroad Co.*, 15 Gray (Mass.) 20, 77 Am. D. 347; [149] *Chicago & North-Western Railway Co. v. Williams*, 55 Ill. 185, 8 Am. R. 641; [138] *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. R. 66; *Johnson v. Concord Railroad Corporation*, 46 N. H. 213, 88 Am. D. 199; *Chicago & Erie Railroad Co. v. Field*, 7 Ind. App. 172, 34 N. E. R. 406, 52 Am. St. R. 444; *Illinois Central Railroad Co. v. Whittemore*, 43 Ill. 420, 92 Am. D. 138; *Commonwealth v. Power*, 7 Metc. (Mass.) 596, 41 Am. D.

465, and extended note; *Day v. Owen*, 5 Mich. 520, 72 Am. D. 62.

§ 341. [142] *Forsee v. Alabama Great Southern Railroad Co.*, 63 Miss. 66, 56 Am. R. 801; *Commonwealth v. Power*, 7 Metc. (Mass.) 596, 41 Am. D. 465; [149] *Chicago & North-Western Railway Co. v. Williams*, 55 Ill. 185, 8 Am. R. 641; *Atchison, Topeka & Santa Fe Railroad Co. v. Gants*, 38 Kan. 608, 17 Pac. R. 54, 5 Am. St. R. 780; *Maples v. New York & New Haven Railroad Co.*, 38 Conn. 557, 9 Am. R. 434; *Lynch v. Metropolitan Elevated Railway Co.*, 90 N. Y. 77, 43 Am. R. 141.

to unnecessarily subject the passenger to inconvenience and annoyance.

§ 342. — **Regulations are reasonable** which require that a ticket shall be purchased and presented before passing the gates to the train, which direct when and where a train may be boarded, which require passengers to ride on passenger trains only and in certain cars on such trains, which limit the time within which a ticket may be used, which provide that certain trains shall not stop at designated places, which compel orderly conduct and presentable condition on the part of passengers. But such rules must be uniform in their application to persons. Discriminations must not be capricious, but must be based upon some principle that the law recognizes as just.

And the trainmen need not wait till a rule is broken, but may anticipate and prevent unseemly and disorderly conduct by expelling an offender before the overt act is committed. Whether a regulation is reasonable depends upon the facts of each case. If the facts are undisputed it becomes a question of law.

§ 343. — **Ejection of passengers for breach of reasonable regulations** may be made at any place unless, as is the case in many states, statutes forbid the ejection of any person from a train except at a regular station or near a dwelling house. But while the carrier need not consult the convenience of a

§ 342. [142] *Forsee v. Alabama Great Southern Railroad Co.*, 63 Miss. 66, 56 Am. R. 801; *State v. Overton*, 4 Zab. (N. J.) 435, 61 Am. D. 671; [149] *Chicago & North-Western Railway Co. v. Williams*, 55 Ill. 185, 8 Am. R. 641; *Atchison, Topeka & Santa Fe Railroad Co. v. Gants*, 38 Kan. 608, 17 Pac. R. 54, 5 Am. St. R. 780; *Johnson v. Concord Railroad Corporation*, 46 N. H. 213, 88 Am. D. 199; *Houston & Texas Central Railway Co. v. Moore*, 49 Tex. 31, 30 Am. R. 98; [138] *Standish v. Narragansett Steamship Co.*, 111 Mass. 512, 15 Am. R. 66; *Lynch v. Metropolitan Elevated Railway Co.*, 90 N. Y. 77, 43 Am. R. 141; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. R. 232; *Commonwealth v. Power*, 7 Metc. (Mass.) 596, 41 Am. D. 465; *Pittsburg etc. Railway Co. v. Lyon*, 123 Pa. St. 140, 16 Atl. R. 607, 10 Am. St. R. 517; *Day v. Owen*, 5 Mich. 520, 72 Am. D. 62; *Pittsburg etc. Railway Co. v. Vandyne*, 57 Ind. 576, 26 Am. R. 68.

§ 343. *Illinois Central Railroad Co. v. Whittamore*, 43 Ill. 420, 92 Am. D. 138; *Atchison, Topeka & Santa Fe Railroad Co. v. Gants*, 38 Kan. 608, 17 Pac. R. 54, 5 Am. St. R. 780; *McClure v. Philadelphia etc. Railroad Co.*, 34 Md. 532, 6 Am. R. 345; [139] *O'Brien v. Boston etc. Railroad Co.*, 15 Gray (Mass.) 20, 77 Am. D. 347; *Manning v. Louis-*

passenger who has forfeited his right to ride, yet he must not needlessly expose such passenger to peril. He may use as much force as is necessary to accomplish the ejection but will be liable if he uses more and injury results.

Offer to pay, or to conform to reasonable requirements, comes too late after the train has been stopped to put the passenger off. The passenger has a right to resist wrongful ejection, but he need not do so to preserve his rights. Paying a fare under protest as fully protects all his rights as resistance, and the courts are loath to encourage resistance, which may or may not be rightful, by increasing the damages for injury received because of such resistance, even though the passenger may be within his rights.

(3) *Duty to Accept All.*

§ 344. Common carriers of passengers rest under the same duty to serve all as do common carriers of goods. It is the rule therefore that all persons who present themselves in proper condition, ready, able and willing to pay their fare, at a proper time and place, are entitled to be carried by the carrier, provided he has room in his vehicle. It is equally

ville & Nashville Railroad Co., 95 Ala. 392, 11 S. R. 8, 36 Am. St. R. 225; Hoffbauer v. Delhi etc. Railroad Co., 52 Iowa 342, 35 Am. R. 278; Jeffersonville Railroad Co. v. Rogers, 38 Ind. 116, 10 Am. R. 103; [142] Forsee v. Alabama & Great Southern Railroad Co., 63 Miss. 66, 56 Am. R. 801; Philadelphia etc. Railroad Co. v. Larkin, 47 Md. 155, 28 Am. R. 442; [151] Memphis & Charleston R. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. R. 5, 4 Am. St. R. 776; Alabama Great Southern R. Co. v. Frazier, 93 Ala. 45, 9 S. R. 303, 30 Am. St. R. 28; Haug v. Great Northern Railway Co., 8 N. D. 23, 77 N. W. R. 97, 73 Am. St. R. 727; Hibbard v. Erie Railroad Co., 15 N. Y. 455; Van Dusan v. Grand Trunk Railway Co., 97 Mich. 439, 56 N. W. R. 848, 37 Am. St. R. 354; Kiley v. Chicago City Railway Co., 189 Ill. 384, 59 N. E. R. 794,

82 Am. St. R. 460. Compare Yorton v. Milwaukee etc. Railway Co., 54 Wis. 234, 11 N. W. R. 482, 41 Am. R. 23, with Lake Erie & Western Railway Co. v. Fix, 88 Ind. 381, 45 Am. R. 464, and [141] O'Rourke v. Citizens' Street Railway Co., 103 Tenn. 124, 52 S. W. R. 872, 76 Am. St. R. 639.

§ 344. [150] Zachery v. Mobile & Ohio Railroad Co., 74 Miss. 520, 21 S. R. 246, 60 Am. St. R. 529; Day v. Owen, 5 Mich. 520, 72 Am. D. 62; Beekman v. Saratoga etc. Railroad Co., 3 Paige Ch. (N. Y.) 45, 22 Am. D. 679; [149] Chicago & North-Western Railway Co. v. Williams, 55 Ill. 185, 8 Am. R. 641; Railroad Commissioners v. Portland etc. Railroad Co., 63 Me. 269, 18 Am. R. 208; McDuffee v. Portland etc. Railroad Co., 52 N. H. 430, 13 Am. R. 72.

true that only those who so present themselves have any claim to be carried.

§ 345. The carrier may refuse to accept those who are unfit to travel, who refuse to obey reasonable regulations, who wish to travel for illegal or immoral purposes, or whose presence is offensive or dangerous to the comfort or health of passengers, or might cause disorder and violence on the way or at the end of the journey. And no one has a right to insist on being carried on Sunday, or for the purpose of engaging in traffic on the route. Such business the carrier has a right to control for its own benefit.

(4) *Duty to Furnish Accommodations.*

§ 346. Equal accommodations must be provided for all passengers of a certain class. But separate cars may be provided for persons of different color, or sex, provided they are substantially equal, and more elaborate accommodations may be provided for holders of first class tickets, or for through passengers, than for others.

§ 347. Means of conveyance.—The carrier is bound to use all reasonable efforts to provide adequate accommodations for its passengers. It undertakes to furnish them not only transportation but a seat, and a passenger need not surrender his

§ 345. [150] Zachery v. Mobile & Ohio Railroad Co., 74 Miss. 520, 21 S. R. 246, 60 Am. St. R. 529; Sevier v. Vicksburg & Meridian Railroad Co., 61 Miss. 8, 48 Am. R. 74; Lemont v. Washington & Georgetown Railroad Co., 1 Mack. (D. C.) 180, 47 Am. R. 238; Pearson v. Duane, 4 Wall. (U. S.) 605; Walsh v. Chicago, Milwaukee & St. Paul Railway Co., 42 Wis. 23, 24 Am. R. 376; Pittsburg etc. Railway Co. v. Vandyne, 57 Ind. 576, 26 Am. R. 68.

R. 1016, 82 Am. St. R. 247; [151] Memphis & Charleston Railroad Co. v. Benson, 85 Tenn. 627, 4 S. W. R. 5, 4 Am. St. R. 776.

§ 346. [149] Chicago & North-Western Railway Co. v. Williams, 55 Ill. 185, 8 Am. R. 641; West Chester & Philadelphia Railroad Co. v. Miles, 55 Pa. St. 209, 93 Am. D. 744; Bowie v. Birmingham Railway & Electric Co., 125 Ala. 397, 27 S.

§ 347. St. Louis etc. Railway Co. v. Leigh, 45 Ark. 368, 55 Am. R. 558; [151] Memphis & Charleston Railroad Co. v. Benson, 85 Tenn. 627, 4 S. W. R. 5, 4 Am. St. R. 776; [152] Ingalls v. Bills, 9 Metc. (Mass.) 1, 43 Am. D. 346; Hegeman v. Western Railroad Corp., 16 Barb. (N. Y.) 353, 13 N. Y. 9, 64 Am. D. 517; [153] Meier v. Pennsylvania Railroad Co., 64 Pa. St. 225, 3 Am. R. 581; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. R. 286, 13 Am. St. R. 175; Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. R. 270, 38 Am. St. R. 753.

ticket until he is furnished a seat. But he cannot insist upon being carried free, and if he chooses to ride without a seat he must pay. If he is unwilling to do so he must leave the train at the first reasonable opportunity and sue the carrier for the damages proximately resulting from its breach of contract.

For the slightest negligence on the part of the carrier of passengers in providing safe means of conveyance it is liable, if injury to the passenger results. The carrier must use the utmost diligence to provide such vehicles as shall insure the safety of the passengers, but for latent defects which no known and practicable test would discover it is not responsible. By the weight of authority the carrier is as to the passenger also liable for the failure on the part of the manufacturer to discover defects in the vehicle which known tests would have revealed. There is no relation between the manufacturer and the passenger, but the carrier makes the manufacturer his agent or servant by employing him to make the vehicle.

§ 348. Roadbeds, bridges, etc., must be kept in safe and usable condition, and for failure so to do the carrier incurs the same liability as for using a defective vehicle.

§ 349. —Latest improvements.—In the construction and equipment of their vehicles and road carriers of passengers must keep pace with the march of progress. The law does not require the adoption of every new device no matter how novel or expensive, but it does demand that the carrier shall employ the latest and best devices in general use by carriers of that class.

§ 350. Agents and servants of the carrier must be competent, careful and courteous. For any injury resulting from

§ 348. O'Donnell v. Allegheny Valley Railroad Co., 59 Pa. St. 239, 98 Am. D. 336; Ohio Valley Railway Co. v. Watson, 93 Ky. 654, 21 S. W. R. 244, 40 Am. St. R. 211; [154] Commonwealth v. Boston & Maine Railroad Co., 129 Mass. 500, 37 Am. R. 382; Louisville, New Albany & Chicago Railway Co. v. Snyder, 117 Ind. 435, 20 N. E. R. 284, 10 Am. St. R. 60.

3 Am. R. 581; Le Barron v. East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. D. 717; Hegeman v. Western Railroad Corp., 13 N. Y. 9, 64 Am. D. 517; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. R. 266, 13 Am. St. R. 175.

§ 349. [153] Meier v. Pennsylvania Railroad Co., 64 Pa. St. 225,

§ 350. Goddard v. Grand Trunk Railway Co., 57 Me. 202, 2 Am. R. 39; Birmingham Railway & Electric Co. v. Baird, 130 Ala. 334, 30 S. R. 456, 89 Am. St. R. 43; Haver v. Central Railroad Co., 62 N. J.

the incompetence, carelessness or misconduct of its servants the carrier is liable, whether it knew of such unfitness or not. The liability arises not out of the responsibility of the master for the acts of his servants, but out of the obligation which the law imposes upon the carrier to protect the passenger from ill treatment by its servants, fellow passengers or strangers. The severest rule of damages is applied if a company retains in its employ one known to be of intemperate habits, or in any way unfit.

§ 351. **Stational facilities.**—A railroad is required to maintain a station, means of access to and from the same, and facilities for getting to and from trains, that are reasonably safe. There is not the same reason for the utmost care about the station that exists as to the roadway and cars, but for the slightest negligence in providing and maintaining reasonably safe stational facilities the carrier is liable if injury results. As to persons not passengers who have business at the station only ordinary care is required.

(5) *Liability for Injuries to the Passenger.*

§ 352. **Measure of diligence.**—The common carrier of passengers is bound to use for the safety of his passengers all precautions as far as human care and foresight will go. For

L. 282, 41 Atl. R. 916, 72 Am. St. R. 647; Savannah etc. Railway Co. v. Quo, 103 Ga. 125, 29 S. E. R. 607, 68 Am. St. R. 85; [154] Commonwealth v. Boston & Maine Railroad Co., 129 Mass. 500, 37 Am. R. 382; Gillingham v. Ohio River Railroad Co., 35 W. Va. 588, 14 S. E. R. 243, 29 Am. St. R. 827.

§ 351. Delaware, Lackawanna & Western Railroad Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. R. 178, 19 Am. St. R. 442; Barker v. Ohio River Railroad Co., 51 W. Va. 423, 41 S. E. R. 148, 90 Am. St. R. 808; [131] Warren v. Fitchburg Railroad Co., 8 Allen (Mass.) 227, 85 Am. D. 700; Little Rock etc. Railway Co. v. Lawton, 55 Ark. 428, 18 S. W. R. 543, 29 Am. St. R. 48, and note; Gillis v. Pennsylvania Railroad Co.,

59 Pa. St. 129, 98 Am. D. 317; Cross v. Lake Shore & Michigan Southern Railway Co., 69 Mich. 363, 37 N. W. R. 361, 13 Am. St. R. 399; McKone v. Michigan Central Railroad Co., 51 Mich. 601, 17 N. W. R. 74, 47 Am. R. 596; Tubbs v. Michigan Central Railroad Co., 107 Mich. 108, 64 N. W. R. 1061, 61 Am. St. R. 320; McDonald v. Chicago & Northwestern Railway Co., 26 Ia. 124, 96 Am. D. 114; Atlantic City Railroad Co. v. Goodin, 62 N. J. L. 394, 42 Atl. R. 333, 72 Am. St. R. 652.

§ 352. [155] Christie v. Griggs, 2 Camp. 79; [136] Philadelphia & Reading Railroad Co. v. Derby, 14 How. (U. S.) 468; [135] Steamboat New World v. King, 16 How. (U. S.) 469; [152] Ingalls v. Bills, 9 Metc. (Mass.) 1, 43 Am. D. 346;

injuries to the passenger proximately caused by any, even the slightest, negligence of the carrier, the latter is liable. If however the contributory negligence of the passenger is the proximate cause of the injury the carrier is of course not liable.

The carrier of passengers then is not, like the common carrier of goods, an insurer against loss, "but as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men; and his undertaking as to his passengers goes to this extent, that as far as human foresight and care can reasonably go he will transport them safely."

§ 353. —As far as human care and foresight will go is a phrase that has come to have a technical meaning in this connection. On the one hand it does not mean all the care conceivable regardless of expense, mode of conveyance or extent of the carrier's business. On the other, it does mean

Farish v. Reigle, 11 Grat. (Va.) 697, 62 Am. D. 666; [100] Hollister v. Nowlen, 19 Wend. (N. Y.) 234, 32 Am. D. 455; Hadley v. Cross, 34 Vt. 586, 80 Am. D. 699; [153] Meier v. Pennsylvania Railroad Co., 64 Pa. St. 225, 3 Am. R. 581; [156] Jamison v. Chesapeake & Ohio Railway Co., 92 Va. 327, 23 S. E. R. 758, 53 Am. St. R. 813; Bonce v. Dubuque Street Railway Co., 53 Iowa 278, 5 N. W. R. 177, 36 Am. R. 221; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. R. 266, 13 Am. St. R. 175; Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. R. 270, 38 Am. St. R. 753; Hegeman v. Western Railroad Corp., 13 N. Y. 9, 64 Am. D. 517; McKeon v. Chicago, Milwaukee & St. Paul Railway Co., 94 Wis. 477, 69 N. W. R. 175, 59 Am. St. R. 910; Connell v. Chesapeake & Ohio Railway Co., 93 Va. 44, 24 S. E. R. 467, 57 Am. St. R. 786; Cooley on Torts, 642.

§ 353. In addition to the cases cited in sec. 352, see [157] Dodge v. Boston & Bangor Steamship Co., 148 Mass. 207, 19 N. E. R. 373, 12 Am. St. R. 541; [158] Pennsylvania Railroad Co. v. Aspell, 23 Pa. St. 147, 62 Am. D. 323; Baltimore & Ohio Railroad Co. v. Breinig, 25 Md. 378, 90 Am. D. 49; [131] Warren v. Fitchburg Railroad Co., 8 Allen (Mass.) 227, 85 Am. D. 700; [103] Railroad v. Lockwood, 17 Wall. (U. S.) 357; Baltimore & Ohio Railroad Co. v. Worthington, 21 Md. 275, 83 Am. D. 578; Delaware, Lackawanna & Western Railroad Co. v. Trautwein, 52 N. J. L. 169, 19 Atl. R. 178, 19 Am. St. R. 442; Barker v. Ohio River Railroad Co., 51 W. Va. 423, 41 S. E. R. 148, 90 Am. St. R. 808; Weightman v. Louisville etc. Railway Co., 70 Miss. 563, 12 So. R. 586, 35 Am. St. R. 660.

the utmost care and diligence of very cautious persons, a rigorous insistence upon all the diligence consistent with the nature of the carrier's undertaking and the requirements of the business.

As already noted (§§ 346-351), this diligence extends to careful provision as to the means of conveyance, roadbed, bridges, improved appliances, proper station facilities and careful and considerate agents and servants. The care must be proportioned to the character of the transportation employed by the carrier and to all the circumstances of the journey. Sick or infirm passengers must be treated with humanity and consideration. If there is an accident the presumption arises that the carrier has failed to exercise this extraordinary care and the burden rests upon the carrier to repel such presumption.

§ 354. —**Gratuitous passengers.**—This care is exacted as to all passengers alike. Public policy demands that human life be protected, and the fact that a passenger is riding gratuitously furnishes no excuse for the carrier's negligence. The liability does not grow out of a contract, expressed or implied, but the "law raises the duty out of regard for human life and for the purpose of securing the utmost diligence by carriers in protecting those who have committed themselves to their hands." This protection does not extend to one not lawfully a passenger.

§ 355. **Contributory negligence.**—Men are in general responsible for the consequences reasonably to be anticipated from their own acts. A passenger therefore can not hold a carrier liable for an injury from any cause if his own negligence was a natural and proximate cause contributing to the injurious result. In a word the passenger can not hold the

§ 354. *Ante*, sec. 323 and cases cited. [136] Philadelphia & Reading Railroad Co. v. Derby, 14 How. (U. S.) 468; [103] Railroad v. Lockwood, 17 Wall. (U. S.) 357; Carroll v. Staten Island Railroad Co., 58 N. Y. 126, 17 Am. R. 221. § 355. [158] Pennsylvania Railroad Co. v. Aspell, 23 Pa. St. 147, 62 Am. D. 323; Graham v. McNeill, 20 Wash. 466, 55 Pac. R. 631, 72 Am. St. R. 121; Walker v. Vicksburg etc. Railroad Co., 41 La. Ann. 795, 6 So. R. 916, 17 Am. St. R. 417, and note; [156] Jammison v. Chesapeake & Ohio Railway Co., 92 Va. 327, 23 S. E. R. 758, 53 Am. St. R. 813; Florida Southern Railway Co. v. Hirst, 30 Fla. 1, 11 So. R. 506, 32 Am. St. R. 17.

carrier liable for an injury if he himself has been guilty of contributory negligence.

§ 356. —What amounts to contributory negligence is usually a question for the jury to determine from all the facts and circumstances of the case. Even where the facts are undisputed it is still ordinarily a question for the jury whether the conduct of the passenger was that to be expected of a reasonably prudent man under like circumstances. If it was not there was negligence. The facts in some cases make the negligence or prudence of a passenger so clear that but one inference can be drawn therefrom. In such cases contributory negligence is a question of law for the court.

§ 357. —Illustrations.—The following are facts from which a jury may properly determine according to the surrounding circumstances of each case that the passenger has or has not been guilty of contributory negligence: entering or leaving a moving train, riding on the platform or on a part of the train not intended for passengers when seats are provided by the carrier in the passenger cars, alighting at a place other than the regular stopping place, riding with the arms or other part of the body projecting beyond the out-

§ 356. [159] *Filer v. New York Central Railroad Co.*, 49 N. Y. 47, 10 Am. R. 327; *Lambeth v. North Carolina Railroad Co.*, 66 N. C. 494, 8 Am. R. 508; *Graham v. McNeill*, 20 Wash. 466, 55 Pac. R. 631, 72 Am. St. R. 121; *Atlantic City Railroad Co. v. Goodin*, 62 N. J. L. 394, 42 Atl. R. 333, 72 Am. St. R. 652; *Wade v. Columbia Railway etc. Co.*, 51 S. C. 296, 29 S. E. R. 233, 64 Am. St. R. 676; *Tubbs v. Michigan Central Railroad Co.*, 107 Mich. 108, 64 N. W. R. 1061, 61 Am. St. R. 320; *Terre Haute etc. Railroad Co. v. Buck*, 96 Ind. 346, 49 Am. R. 168; *Weber v. Kansas City Cable Railway Co.*, 100 Mo. 194, 12 S. W. R. 804, 13 S. W. R. 587, 18 Am. St. R. 541; *Piper v. New York Central Railroad Co.*, 156 N. Y. 224, 50 N. E. R. 851, 66 Am. St. R. 560; *Schiffler v. Chicago & Northwestern Rail-*

way Co., 96 Wis. 141, 71 N. W. R. 97, 65 Am. St. R. 35.

§ 357. [159] *Filer v. New York Central Railroad Co.*, 49 N. Y. 47, 10 Am. R. 327; [158] *Pennsylvania Railroad Co. v. Aspell*, 23 Pa. St. 147, 62 Am. D. 323; *Buel v. New York Central Railroad Co.*, 31 N. Y. 314, 88 Am. D. 271; *Weber v. Kansas City Cable Railway Co.*, 100 Mo. 194, 12 S. W. R. 804, 13 S. W. R. 587, 18 Am. St. R. 541; *Neff v. Harrisburg Traction Co.*, 192 Pa. St. 501, 43 Atl. R. 1020, 73 Am. St. R. 825; *New York, Lake Erie & Western Railroad Co. v. Enches*, 127 Pa. St. 316, 17 Atl. R. 991, 14 Am. St. R. 848; *Lambeth v. North Carolina Railroad Co.*, 66 N. C. 494, 8 Am. R. 508; *Memphis & Charleston Railroad Co. v. Whitfield*, 44 Miss. 466, 7 Am. R. 699; *St. Louis etc. Rail-*

side of the car, alighting from a car in front of a train moving on another track.

If a trainman invites or directs a passenger to get on or off a moving train the presumption arises that such trainman knew his business and that it is safe to do so. And even if some danger is apparent to the passenger he will be justified in acting as a reasonably prudent man would be supposed to act under similar circumstances. If the carrier by its fault puts the passenger to a choice between jumping from a moving train and being carried by his station, it is responsible for results, unless the passenger acts rashly and exposes himself to danger that a prudent man would not incur. And the carrier is liable if its trains are so carelessly operated as to lead passengers in the exercise of reasonable prudence to apprehend danger, and in trying to escape it they are injured. This is true though it may turn out that they would have received no harm but for their attempt to escape.

§ 358. — **Proximate cause.**—The contributory negligence of the passenger must have been a proximate cause of the injury. Even when negligent the carrier will not be liable

road Co. v. Cantrell, 37 Ark. 519, 40 Am. R. 105; Florida Southern Railway Co. v. Hirst, 30 Fla. 1, 11 So. R. 506, 32 Am. St. R. 17; Illinois Central Railroad Co. v. Green, 81 Ill. 19, 25 Am. R. 255; Walker v. Vicksburg etc. Railroad Co., 41 La. Ann. 795, 6 So. R. 916, 17 Am. St. R. 417, and note; Evansville etc. Railroad Co. v. Athon, 6 Ind. App. 295, 33 N. E. R. 469, 51 Am. St. R. 303; Graham v. McNeill, 20 Wash. 466, 55 Pac. R. 631, 72 Am. St. R. 121; Benedict v. Minneapolis & St. Louis Railroad Co., 86 Minn. 224, 90 N. W. R. 360, 91 Am. St. R. 345; Clerc v. Morgan's etc. Railroad & Steamship Co., 107 La. 370, 31 So. R. 886, 90 Am. St. R. 319; Creamer v. West End Street Railway Co., 156 Mass. 320, 31 N. E. R. 391, 32 Am. St. R. 456; Cartwright v. Chicago & Grand Trunk Railway Co., 52 Mich. 606, 18 N. W. R. 380, 50 Am. R. 274; Terre Haute etc. Railroad Co. v. Buck, 96 Ind. 346, 49 Am. R. 168; Irish v. Northern Pacific Railroad Co., 4 Wash. 48, 29 Pac. R. 845, 31 Am. St. R. 899; St. Louis etc. Railway Co. v. Murray, 55 Ark. 248, 18 S. W. R. 50, 29 Am. St. R. 32.

§ 358. [156] Jammison v. Chesapeake & Ohio Railway Co., 92 Va. 327, 23 S. E. R. 758, 53 Am. St. R. 813; Schiffler v. Chicago & Northwestern Railway Co., 96 Wis. 141, 71 N. W. R. 97, 65 Am. St. R. 35; Weber v. Kansas City Cable Railway Co., 100 Mo. 194, 12 S. W. R. 804, 13 S. W. 587, 18 Am. St. R. 541; Morrissey v. Wiggins Ferry Co., 43 Mo. 380, 97 Am. D. 402; Zemp v. Wilmington etc. Railroad Co., 9 Rich. L. (S. C.) 84, 64 Am. D. 763; McDonald v. International etc. Railway Co., 86 Tex. 1, 22 S. W. R. 939, 40 Am. St. R. 803, and note. See *post*, sec. 416.

if its negligence was not the proximate cause of the injury, or if the passenger's negligence and that of the carrier both directly contributed to the result. But on the other hand, the negligence of the passenger is no defence to the carrier unless such negligence so far contributed to the result as to be in some degree a proximate cause of the injury complained of. If in spite of the negligence of the passenger the carrier might have averted the injury, this last negligence will be the proximate cause and the carrier will still be liable.

Sleeping Car Companies.

§ 359. **Not common carriers.**—Sleeping car companies, it has been seen (§ 166), are not innkeepers. Neither are they, as to the baggage and valuables of the passenger, common carriers. The railroad company is the carrier, and the sleeping car company merely furnishes the car and reserves to itself the right to provide a conductor and a porter, and to charge for the use of its berths any person who has become a passenger of the railroad, and yet in many respects the duties of sleeping car companies are similar to those of common carriers of passengers and their liabilities are most naturally treated of in this connection.

§ 360. **Nature of their undertaking.**—"A sleeping car company holds itself out to the world as furnishing safe and comfortable cars, and when it sells a ticket it impliedly stipulates to do so. It invites passengers to pay for and make use of its cars for sleeping, all parties knowing that during the greater part of the night the passenger will be asleep powerless to protect himself or to guard his property." The company is therefore bound to furnish reasonable protection, to have an employee to watch the berths while the passengers are sleep-

§ 359. [54] *Blum v. Pullman Palace Car Co.*, 1 Flip. (U. S.) 500; R. 331, and *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. R. 814, 5 Am. St. R. 31.
[53] *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. R. 258; *Pullman Palace Car Co. v. Gavin*, 93 Tenn. 53, 23 S. W. R. 70, 42 Am. St. R. 902; *Pullman Palace Car Co. v. Matthews*, 74 Tex. 654, 12 S. W. R. 744, 15 Am. St. R. 873; *Pullman Palace Car Co. v. Adams*, 120 Ala. 581, 24 So. R. 921, 74 Am. St. R. 53. See extended note to *Pullman*

Palace Car Co. v. Lowe, 26 Am. St. R. 331, and *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. R. 814, 5 Am. St. R. 31.

§ 360. [54] *Blum v. Pullman Palace Car Co.*, 1 Flip. (U. S.) 500; *Lewis v. New York Central Sleeping Car Co.*, 143 Mass. 267, 9 N. E. R. 615, 56 Am. R. 852; *Carpenter v. New York etc. Railroad Co.*, 124 N. Y. 53, 26 N. E. R. 277, 21 Am. St. R. 644; *Pullman Palace Car Co.*

ing, to defend their property from thieves and their persons from insult, and in general, to exercise a degree of care commensurate with the danger to which passengers are exposed. If there is a vacant berth in the car the company is bound to furnish this accommodation and protection to any proper person who offers at the proper time and place to pay the fare fixed therefor, in other words, the calling is a public one.

§ 361. Liability of the sleeping car company.—If through lack of commensurate care or through failure to suitably guard and protect the passenger and his effects, injury is suffered, the company is liable. The liability is a question of negligence. It must further appear that the loss was not due to the negligence of the passenger, and that the goods or valuables lost were such as may properly be carried for the use or convenience of the passenger upon the journey.

Owners of Passenger Elevators.

§ 362. Are carriers of passengers.—In accordance with the general rule that the utmost care and diligence must be exercised in all cases where human life is involved, it is held that those who operate passenger elevators in public or semi-public buildings are carriers of passengers undertaking to carry safely passengers who use the elevator, so far as the utmost human care and foresight will go. For the slightest neglect in the construction, repair or operation of the elevator resulting in injury to persons riding therein the owners or operators are liable.

v. Adams, 120 Ala. 581, 24 So. R. 921, 74 Am. St. R. 53; Connell v. Chesapeake & Ohio Railway Co., 93 Va. 44, 24 S. E. R. 467, 57 Am. St. R. 786; Nevin v. Pullman Palace Car Co., 106 Ill. 222, 46 Am. R. 688.
§ 361. Lewis v. New York Central Sleeping Car Co., 143 Mass. 267, 9 N. E. R. 615, 56 Am. R. 852; [54] Blum v. Pullman Palace Car Co., 1 Flip. (U. S.) 500; Illinois Central Railroad Co. v. Handy, 63 Miss. 609, 56 Am. R. 846; Pullman Palace Car Co. v. Adams, 120 Ala. 581, 24 So. R. 921, 74 Am. St. R. 53; Woodruff etc. Co. v. Diehl, 84 Ind. 474, 43 Am. R. 102.

§ 362. Treadwell v. Whittier, 80 Cal. 574, 22 Pac. R. 266, 13 Am. St. R. 175; Southern Building & Loan Association v. Lawson, 97 Tenn. 367, 37 S. W. R. 86, 56 Am. St. R. 804; Goodsell v. Taylor, 41 Minn. 207, 42 N. W. R. 873, 16 Am. St. R. 700; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. R. 178, 64 Am. St. R. 35; [160] Springer v. Ford, 189 Ill. 430, 59 N. E. R. 953, 82 Am. St. R. 464. See also the extended note to 77 Am. St. R. 26, *contra* Griffen v. Manice, 166 N. Y. 188, 59 N. E. R. 925, 82 Am. St. R. 630; Burgess v. Stowe, — Mich. —, 96 N. W. R. 29.

(6) *Liability for Delay.*

§ 363. Reasonable diligence in beginning, continuing and ending the transportation is the undertaking of the passenger carrier. No liability is incurred by delays for which there is reasonable excuse; carriers are not warrantors of speed.

Published time-tables are public professions, and carriers must make all reasonable effort to carry according to their schedules. For wilful or needless departures therefrom the carrier is liable to one who incurs loss as a proximate result of such fault of the carrier. The test of liability is negligence, failing to use due care and skill to run in conformity to the time-table. Changes in the time-table must be given the same notice as the publication of the table itself.

(7) *Liability for Passenger's Baggage.*

§ 364. Insurers of baggage.—As to the passenger's baggage the carrier is a common carrier of goods, and an insurer against all losses but those due to the excepted perils. The payment of fare covers payment for carrying a reasonable amount of baggage. The liability arises when the baggage has been delivered to the agent of the carrier, or if there be a custom to receive baggage left in a certain place, depositing it there at any reasonable time before the departure of the train is enough. The liability of the carrier does not depend

§ 363. *Gordon v. The Railroad*, 52 N. H. 596, 13 Am. R. 97; *Weed v. Panama Railroad Co.*, 17 N. Y. 362, 72 Am. D. 474; [161] *Sears v. Eastern Railroad Co.*, 14 Allen (Mass.) 433, 92 Am. D. 780; *Hurst v. Great Western Railway Co.*, 19 C. B. (N. S.) 310, 115 E. C. L. 310; *Heirn v. McCaughan*, 32 Miss. 17, 66 Am. D. 588, and note; *Georgia Railroad Co. v. Hayden*, 71 Ga. 518, 51 Am. R. 274; *Walsh v. Chicago, Milwaukee & St. Paul Railway Co.*, 42 Wis. 23, 24 Am. R. 376; *Carter v. Peck*, 4 Sneed (Tenn.) 203, 67 Am. D. 604.

§ 364. *Isaacson v. New York Central Railroad Co.*, 94 N. Y. 278, 46 Am. R. 143; [100] *Hollister v.*

Nowlen, 19 Wend. (N. Y.) 234, 32 Am. D. 455; [119] *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 Am. D. 767; *Wilson v. Grand Trunk Railway Co.*, 56 Me. 60, 96 Am. D. 435; *Hickox v. Naugatuck Railroad Co.*, 31 Conn. 281, 83 Am. D. 143; [162] *Goldberg v. Ahnapee & Western Railway Co.*, 105 Wis. 1, 80 N. W. R. 920, 76 Am. St. R. 899; *Wright v. Caldwell*, 3 Mich. 51; *Green v. Milwaukee & St. Paul Railway Co.*, 38 Iowa 100, 41 Iowa 410; *Murray v. International Steamship Co.*, 170 Mass. 166, 48 N. E. R. 1093, 64 Am. St. R. 290; *Moore v. N. Y. etc. Railroad Co.*, 173 Mass. 335, 53 N. E. R. 816, 73 Am. St. R. 298.

upon the delivery or non-delivery of the baggage check. Among several connecting carriers on the route the same rules and presumptions prevail as to liability for baggage as have been already explained in the case of connecting carriers of goods (§§ 290-299).

§ 365. What is baggage depends on the person and the conditions of the journey. Whatever one carries for his personal use, convenience or amusement, according to the habits or wants of the class to which he belongs, for his use on the way or for the ultimate purpose of the journey, is baggage.

The use must be personal to the traveler, and not merchandise or samples for business, nor articles for permanent use after he ceases to be a traveler. If however the carrier knowingly chooses to treat other goods as baggage, and to carry them as such, he will be responsible therefor. The question is often one of fact for the jury, to be determined from all the circumstances of the case.

§ 366. Value of baggage.—The carrier is not an insurer of goods and money carried by the traveler beyond what is reasonably necessary for the convenience and comfort of the traveler as such, according to his station in life. It can not

§ 365. [163] New York Central Railroad Co. v. Fraloff, 100 U. S. 24; Hannibal etc. Railroad Co. v. Swift, 12 Wall. (U. S.) 262; Maycrow v. Great Western Railway Co., L. R. 6 Q. B. 612; [93] Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. D. 129; [119] Hawkins v. Hoffman, 6 Hill. (N. Y.) 586, 41 Am. D. 767; Oakes v. Northern Pacific Railroad Co., 20 Ore. 392, 26 Pac. R. 230, 23 Am. St. R. 126; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. D. 646. (Compare Connolly v. Warren, 106 Mass. 146, 8 Am. R. 300.) Coward v. East Tennessee & Georgia Railroad Co., 16 Lea (Tenn.) 225, 57 Am. R. 226; Dibble v. Brown, 12 Ga. 217, 56 Am. D. 460; Michigan Central Railroad Co. v. Carrow, 73 Ill. 348, 24 Am. R. 248; Toledo & Ohio Central Railway Co. v. Bowler & Burdick Co., 57

Ohio St. 38, 47 N. E. R. 1039, 63 Am. St. R. 702; Kansas City etc. Railway Co. v. McGahey, 63 Ark. 344, 38 S. W. R. 659, 18 Am. St. R. 111; Bomar v. Maxwell, 9 Humph. (Tenn.) 620, 51 Am. D. 682; Runyan v. Central Railroad Co., 61 N. J. L. 537, 41 Atl. R. 367, 68 Am. St. R. 711. Compare Blumantle v. Fitchburg Railroad Co., 127 Mass. 322, 34 Am. R. 376, with Minter v. Pacific Railroad Co., 41 Mo. 503, 97 Am. D. 288.

§ 366. [93] Orange County Bank v. Brown, 9 Wend. (N. Y.) 85, 24 Am. D. 129; [163] New York Central Railroad Co. v. Fraloff, 100 U. S. 24; [54] Blum v. Pullman Palace Car Co., 1 Flap. (U. S.) 500; Pfister v. Central Pacific Railroad Co., 70 Cal. 169, 11 Pac. R. 686, 59 Am. R. 404; Michigan Central Railroad Co. v. Carrow, 73 Ill. 348, 24

be required to carry as luggage such property, but may compel the owner to send it by express or freight. If the traveler wishes the carrier to assume further liability he must reveal the true value, so that the carrier may charge according to the risk. The carrier of baggage unlike the carrier of goods owes no duty to inquire as to the contents of trunks.

§ 367. **Custody of passenger.**—The carrier assumes no responsibility for money and valuables, not properly baggage, carried by the passenger upon his person. And for goods or packages carried as hand baggage the carrier incurs no liability except for negligence. Some cases hold the carrier to the full common law liability as insurers of articles retained by the passenger for his personal use upon the journey and lost without negligence on his part. But the weight of authority seems to hold the carrier to the exercise of proper watchfulness only, and this is especially required in the case of articles of personal apparel carried in a berth in a sleeping car lost while the passenger is enjoying the sleep to which the carrier has invited him.

As to ordinary baggage the custody must be surrendered to the carrier or he is not responsible for its loss. It would be unreasonable to hold the carrier responsible for property never entrusted to his custody at all.

§ 368. **Passenger supposed to accompany baggage.**—It is

Am. R. 248; *Weeks v. New York etc. Railroad Co.*, 72 N. Y. 50, 28 Am. R. 104; *Runyan v. Central Railroad Co.*, 61 N. J. L. 537, 41 Atl. R. 367, 68 Am. St. R. 711; *Toledo & Ohio Central Railway Co. v. Bowler & Burdick Co.*, 57 Ohio St. 38, 47 N. E. R. 1039, 63 Am. St. R. 702.

§ 367. [164] *Kinsley v. Lake Shore & Michigan Southern Railroad Co.*, 125 Mass. 54, 28 Am. R. 200; [54] *Blum v. Pullman Palace Car Co.*, 1 Flap. (U. S.) 500; *Weeks v. New York etc. Railroad Co.*, 72 N. Y. 50, 28 Am. R. 104; *First National Bank v. Marietta & Cincinnati Railroad Co.*, 20 Ohio St. 259, 5 Am. R. 655; *Pfister v. Central Pa-*

cific Railroad Co., 70 Cal. 169, 11 Pac. R. 686, 59 Am. R. 404; *Tower v. Utica etc. Railroad Co.*, 7 Hill (N. Y.) 47, 42 Am. D. 36; *Lewis v. New York Central Sleeping Car Co.*, 143 Mass. 267, 9 N. E. R. 615, 58 Am. R. 135; [53] *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 24 Am. R. 258; *Gleason v. Goodrich Transportation Co.*, 32 Wis. 85, 14 Am. R. 716; *Pullman Palace Car Co. v. Pollock*, 69 Tex. 120, 5 S. W. R. 814, 5 Am. St. R. 31; *Whicher v. Boston & Albany Railroad Co.*, 176 Mass. 275, 57 N. E. R. 601, 79 Am. St. R. 314; *Woodruff Sleeping etc. Co. v. Diehl*, 84 Ind. 474, 43 Am. R. 102.

§ 368. *Wilson v. Grand Trunk*

implied in the ordinary contract of carriage that the baggage and the passenger go together. The carriage of the baggage is an incident to the principal contract to carry the passenger. If therefore the baggage is sent on another train through the carrier's fault the carrier bears the risk, but if the passenger chooses to go by another train, or carries luggage neither belonging to him nor for his personal use upon the journey, the carrier becomes a mere gratuitous bailee as to such baggage. As a matter of course if the carrier consents to carry the baggage by another route or train, his liability remains, and on the other hand if baggage is sent without the carrier's consent by one not buying a ticket or paying for the carriage the carrier can become liable only for wilful or wanton injury.

§ 369. **Delivery of baggage.**—The carrier's liability for the baggage of the passenger continues until it is ready to be delivered to the passenger at his destination, and until he has had a reasonable opportunity to call for it and take it away. What is such reasonable time depends upon circumstances, but usually it is immediately. The passenger can not for his own convenience prolong the period of the extraordinary liability of the carrier. If the baggage is not called for within a reasonable time the carrier may store it and his liability changes to that of a warehouseman.

B. Of the Limitation of the Liability of the Carrier of Passengers by Contract.

§ 370. **As to the baggage** of the passenger the carrier may by contract make limitations of liability subject to the same

Railway Co., 56 Me. 60, 96 Am. D. 435; Wald v. Pittsburg etc. Railroad Co., 162 Ill. 545, 44 N. E. R. 888, 53 Am. St. R. 332; Beers v. Boston etc. Railroad Co., 67 Conn. 417, 34 Atl. R. 541, 52 Am. St. R. 473; Isaacson v. New York Central Railroad Co., 94 N. Y. 278, 46 Am. R. 142; Curtis v. Delaware, Lackawanna & Western Railroad Co., 74 N. Y. 116, 30 Am. R. 271; Coward v. East Tennessee & Georgia Railroad Co., 16 Lea (Tenn.) 225, 57 Am. R. 226; [165] Chicago, R. I. &	P. Railroad Co. v. Boyce, 73 Ill. 510, 24 Am. R. 268. § 369. Roth v. Buffalo etc. Railroad Co., 34 N. Y. 548, 90 Am. D. 736; [165] Chicago, Rock Island & Pacific Railroad Co. v. Boyce, 73 Ill. 510, 24 Am. R. 268; Kansas City etc. Railway Co. v. McGahey, 63 Ark. 344, 38 S. W. R. 659, 58 Am. St. R. 111; Ditman Boot & Shoe Co. v. Keokuk & Western Railroad Co., 91 Iowa 416, 59 N. W. R. 257, 51 Am. St. R. 352; Ouimit v. Henshaw, 35 Vt. 605, 84 Am. D. 646;
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rules as carriers of goods generally (see chapter 12). But conditions limiting the liability for baggage which are printed on the passenger's ticket are of no force unless brought to the notice of the passenger and expressly or impliedly assented to by him.

§ 371. **As to the passenger**, it is doubtful if the carrier in most states can by contract secure exemption from the full care demanded by law. It is public policy and not contract that requires the security of the passenger "as far as human care and foresight will go," and no individual can excuse the carrier. The states that allow the carrier of goods to contract within certain limits against liability for negligence apply the same rules to passenger carriers but with perhaps greater caution and stricter construction.

§ 372. **Gratuitous passengers.**—The courts of a number of states, and of the United States, uphold contracts exempting carriers from liability for injuries to passengers traveling on a pass, and such is the weight of authority. The same rule ap-

Fairfax v. New York Central Railroad Co., 73 N. Y. 167, 29 Am. R. 119.

§ 370. *Coward v. East Tennessee & Georgia Railroad Co.*, 16 Lea (Tenn.) 225, 57 Am. R. 226; *Camden & Amboy Railroad Co. v. Baldauf*, 16 Pa. St. 87, 55 Am. D. 481; *Louisville, New Albany & Chicago Railway Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. R. 424, 51 Am. St. R. 206; [102] *Ranchau v. Rutland Railroad Co.*, 71 Vt. 142, 43 Atl. R. 11, 76 Am. St. R. 761; *Kansas City etc. Railroad Co. v. Rodebaugh*, 38 Kan. 45, 15 Pac. R. 899, 5 Am. St. R. 715, and note, *ante*, sec. 266.

§ 371. [103] *Railroad v. Lockwood*, 17 Wall. (U. S.) 357; [134] *Williams v. Oregon Short Line Railroad Co.*, 18 Utah 210, 54 Pac. R. 991, 72 Am. St. R. 777; [133] *Doyle v. Fitchburg etc. Railroad Co.*, 166 Mass. 492, 44 N. E. R. 611, 55 Am. St. R. 417; *Russell v. Pittsburg etc. Railway Co.*, 157

Ind. 305, 61 N. E. R. 678, 87 Am. St. R. 214; *Illinois Central Railroad Co. v. Beebe*, 174 Ill. 13, 50 N. E. R. 1019, 66 Am. St. R. 253; *Seybolt v. New York, Lake Erie & Western Railroad Co.*, 95 N. Y. 562, 47 Am. R. 75; *Bissel v. New York Central Railroad Co.*, 25 N. Y. 442, 82 Am. D. 369.

§ 372. *Griswold v. New York & New England Railroad Co.*, 53 Conn. 371, 4 Atl. R. 261, 55 Am. R. 115; *Ulrich v. New York Central Railroad Co.*, 108 N. Y. 80, 15 N. E. R. 60, 2 Am. St. R. 369; *Bissel v. New York Central Railroad Co.*, 25 N. Y. 442, 82 Am. D. 369; [133] *Doyle v. Fitchburg Railroad Co.*, 166 Mass. 492, 44 N. E. R. 611, 55 Am. St. R. 417; *Russell v. Pittsburg etc. Railroad Co.*, 157 Ind. 305, 61 N. E. R. 678, 87 Am. St. R. 214; [134] *Williams v. Oregon Short Line Railroad Co.*, 18 Utah 210, 54 Pac. R. 991, 72 Am. St. R. 777; *Baltimore & Ohio etc. Railway*

plies to other persons whom the railway company is under no obligation to carry, such as express messengers, mail clerks and parlor car porters. As no duty to carry such persons exists, the carrier may refuse to undertake the carriage except upon its own terms. Persons accompanying stock and riding on a drover's pass are not gratuitous passengers, but passengers for hire.

In many jurisdictions, however, no distinction is made between gratuitous passengers, passengers riding on reduced rates and passengers paying full fare, on the ground that the law imposes the same duty to protect life and limb in all cases.

(3) TERMINATION OF THE RELATION.

§ 373. *How terminated.*—A contract of carriage may be

- (1) Fully executed, or
- (2) Left incomplete, because
 - a. The passenger has abandoned the journey, or
 - b. The carrier has ejected the passenger from his vehicle.

(1) *Contract to Carry Fully Executed.*

§ 374. *When carrier's relation ends.*—"The carrier is

Co. v. Voigt, 176 U. S. 498; Peterson v. Chicago & Northwestern Railway Co., — Wis. —, 96 N. W. R. 532; [103] Railroad v. Lockwood, 17 Wall. (U. S.) 357; Illinois Central Railroad Co. v. Beebe, 174 Ill. 13, 50 N. E. R. 1019, 66 Am. St. R. 253, note to 61 Am. St. R. 89; Northern Pacific Railway Co. v. Adams, — U. S. —, 24 Sup. Ct. R. 408.

§ 374. [154] Commonwealth v. Boston & Maine Railroad Co., 129 Mass. 500, 37 Am. R. 382; Hansley v. Jamesville etc. Railroad Co., 115 N. C. 602, 20 S. E. R. 528, 44 Am. St. R. 474; Terre Haute & Indianapolis Railroad Co. v. Buck, 96 Ind. 346, 49 Am. R. 168; [157] Dodge v. Boston & Bangor Steamship Co., 148 Mass. 207, 19 N. E. R. 373, 12 Am. St. R. 541; St. Louis, Iron Mountain & South-
ern Railroad Co. v. Cantrell, 37 Ark. 519, 40 Am. R. 105; Lambeth v. North Carolina Railroad Co., 66 N. C. 494, 8 Am. R. 508; Memphis & Charleston Railroad Co. v. Whitfield, 44 Miss. 466, 7 Am. R. 699; [159] Filer v. New York Central Railroad Co., 49 N. Y. 47, 10 Am. R. 327; Harris v. Howe, 74 Tex. 534, 12 S. W. R. 224, 15 Am. St. R. 862; [125] Quimby v. Vanderbilt, 17 N. Y. 306, 72 Am. D. 469; Illinois Central Railroad Co. v. Green, 81 Ill. 19, 25 Am. R. 255; Mitchell v. Grand Trunk Railway Co., 51 Mich. 236, 16 N. W. R. 388, 47 Am. R. 566; Cartwright v. Chicago & Grand Trunk Railway Co., 52 Mich. 606, 18 N. W. R. 380, 50 Am. R. 274; [158] Pennsylvania Railroad Co. v. Aspell, 23 Pa. St. 147, 62 Am. D. 323. See *ante*, secs. 355-358,

bound to exercise the strictest vigilance not only in carrying passengers to their destination but in setting them down safely at the end." The carrier performs his full duty therefore by carrying a passenger to his destination as indicated by his ticket and giving him suitable opportunity to alight in a proper place. An invitation by the carrier to the passenger to alight without allowing a reasonable time, or affording a safe place subjects the carrier to liability for injurious consequences; but the passenger alone is responsible for the results of his contributory negligence. Harm which one brings upon himself is treated so far as others are concerned as though not received at all.

If the carrier contracts for only a portion of the route his duty is completed by carrying the passenger to the point on his line where the transfer is to be made to a connecting carrier's line.

(2) *Contract to Carry left Incomplete.*

§ 375. (a) The passenger may leave the conveyance, with intent to abandon the journey, at any time. If he does he ceases to be a passenger though he may intend to resume the journey by a later train. Leaving for a temporary purpose however does not affect the relation, nor does one cease to be a passenger while traveling from one train to another in the prosecution of the journey. But one stepping from a street car to the public highway ordinarily ceases to be a passenger even while traveling to another car. The highway is not a passenger station.

§ 376. (b) The carrier may eject the passenger before the journey's end, as already noted, for failure to pay fare, or for breach of the carrier's reasonable regulations, and the carrier is not again obliged to receive the passenger.

§ 375. [157] *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 207, 19 N. E. R. 373, 12 Am. St. R. 541; *Parsons v. New York Central Railroad Co.*, 113 N. Y. 355, 21 N. E. R. 145, 10 Am. St. R. 450; *Northrup v. Railway Passenger Assurance Co.*, 43 N. Y. 516, 3 Am. R. 724; [154] *Commonwealth v. Boston & Maine Railroad Co.*, 129 Mass. 500, 37 Am. R. 383; *Stone v. Chicago & Northwestern Railway Co.*, 47 Iowa 82, 29 Am. R. 453; *Creamer v. West End Street Railway Co.*, 156 Mass. 320, 31 N. E. R. 391, 32 Am. St. R. 456. But compare *Keator v. Traction Co.*, 191 Pa. St. 102, 43 Atl. R. 86, 71 Am. St. 758.

§ 376. *Ante*, sec. 343.

OF QUASI-BAILEES.

CHAPTER XV.

OF OTHER CARRIERS.

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| <p>§ 377. Carriers of mail and intelligence.
<i>Post Office Department.</i></p> <p>378. Not properly a bailee.</p> <p>379. Contractors for carrying mail.</p> <p>380. Postmasters.
<i>Telegraph companies as carriers of intelligence.</i></p> <p>381. Definition.
<i>1. Nature of the relation.</i></p> <p>382. Public calling.</p> <p>383. Not common carriers.</p> <p>384. Are quasi-bailees.
<i>2. Rights and duties of telegraph companies as carriers.</i></p> <p>385. Classification.</p> <p>386. (1.) Right to compensation.</p> <p>387. —Discrimination.</p> <p>388. (2.) Right to make rules and regulations.</p> <p>389. —Notice of rules.</p> <p>390. —What rules are reasonable.</p> | <p>§ 391. (3.) Duty to serve all impartially.</p> <p>392. (4.) Duty to provide adequate facilities.</p> <p>393. (5.) Liability for mistakes in transmission.</p> <p>394. —Limiting liability for negligence by contract.</p> <p>395. (6.) Liability for delay or failure to deliver.
<i>3. Termination of the relation.</i></p> <p>396. Delivery where.</p> <p>397. Delivery to whom.</p> <p>398. Delivery to connecting lines.
<i>Telephone companies.</i></p> <p>399. Telegraph and telephone companies alike quasi-public.</p> <p>400. Not common carriers.</p> <p>401. Duty to serve all impartially.</p> <p>402. Patent subject to public control.</p> <p>403. Right to regulate charges.</p> |
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§ 377. **Carriers of mail and of intelligence.**—In addition to the carriers of passengers, considered in the last chapter, there remain for notice the post office as a carrier of mail, and telegraph and telephone companies as carriers of intelligence. Such companies, by the clear weight of authority, are not common carriers, nor even bailees for hire, and yet they exercise a public calling and perform duties nearly resembling those of common carriers. They are in short quasi-bailees.

Post Office Department.

§ 378. **Not properly a bailee.**—The government as a carrier of the mails has been said to be a bailee for hire, and is certainly a public, or common, rather than a private carrier. But while its undertakings are in their nature like those of common carriers yet the government incurs no liability, since it can not be sued except by its own consent and consequently the courts can have no occasion to lay down any rules of liability. It seems more in accord with the facts therefore to consider the post office department and its employees and officers as quasi-bailees.

§ 379. **Contractors for carrying mail** are employees of the government, and between them and those sending matter by mail there is no privity, no relation of bailor and bailee. The contractor for the performance of his duty as carrier is responsible to the government alone.

§ 380. **Postmasters** also are government employees, and in general are responsible to the Post Office Department alone. For personal negligence resulting in loss to a private person they may be liable to such person.

All deputies and employees appointed by postmasters by authority of law are government employees. The postmaster is not liable for their misfeasance unless he was negligent in selecting them. For the acts of persons privately employed by him to do his work he is of course liable as for his own negligence.

Telegraph Companies as Carriers of Intelligence.

§ 381. **Definition.**—Telegraph and telephone companies or-

§ 378. But compare Schouler on Bailments and Carriers, 265-272.

§ 379. Sawyer v. Corse, 17 Grat. (Va.) 230, 94 Am. D. 445; Hutchins v. Brackett, 22 N. H. 252, 53 Am. D. 248; [166] Foster v. Metts, 55 Miss. 77, 30 Am. R. 504; Central Railroad & Banking Co. v. Lampley, 76 Ala. 357, 52 Am. R. 334.

§ 380. Lane v. Cotton, 1 Ld. Ray. 646; Sawyer v. Corse, 17 Grat. (Va.) 230, 94 Am. D. 445;

Coleman v. Frazier, 4 Rich. L. (S. C.) 146, 53 Am. D. 727; [166] Foster v. Metts, 55 Miss. 77, 30 Am. R. 504; Keenan v. Southworth, 110 Mass. 474, 14 Am. R. 613; Raisler v. Oliver, 97 Ala. 710, 12 So. R. 238, 38 Am. St. R. 213.

§ 381. [185] Mentzer v. Western Union Telegraph Co., 93 Iowa 752, 62 N. W. R. 1, 57 Am. St. R. 294.

ganized to serve the public by furnishing an apparatus for conveying intelligence to a distance by means of electricity stand in practically the same relation to the public and are subject to almost the same regulations in performing their quasi-public functions. However the manner of conveying intelligence by telephone differs from that by telegraph so far that in many respects their liabilities differ in kind though not in amount. It serves the present purpose therefore to first consider the telegraph company, and then give attention to telephone companies in so far as they call for separate mention.

1. NATURE OF THE RELATION.

§ 382. **Public calling.**—Telegraph companies exercise a public employment; they are chartered for a public purpose, are granted extraordinary powers including that of eminent domain; they offer their skill and peculiar facilities to all who have occasion to use them; in consequence of these extraordinary privileges and this public holding out they owe the public and those who employ them important services which can not be ignored or avoided. They stand in the position of those engaged in public callings.

§ 383. **Not common carriers.**—In some early cases they were called common carriers of news, and in several states they are now by statute declared to be common carriers. But apart from statute they are at present nowhere regarded as

§ 382. *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126; [167] *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. R. 500; [168] *True v. International Telegraph Co.*, 60 Me. 9, 11 Am. R. 156; *Gray v. Western Union Telegraph Co.*, 87 Ga. 350, 13 S. E. R. 562, 27 Am. St. R. 259; *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421, 14 Am. R. 38; *Smith v. Western Union Telegraph Co.*, 83 Ky. 104, 4 Am. St. R. 126; [169] *Ayer v. Western Union Telegraph Co.*, 79 Me. 493, 10 Atl. R. 495, 1 Am. St. R. 353; *Western Union Telegraph Co. v. Neill*, 57 Tex. 283, 44 Am. R. 589; [170] *Webbe v. Western Union Telegraph Co.*, 169 Ill. 610, 48 N. E. R. 670, 61 Am. St. R. 207.

§ 383. *Parks v. Alta California Telegraph Co.*, 13 Cal. 422, 73 Am. D. 589. (Compare *Hart v. Western Union Telegraph Co.*, 66 Cal. 579, 6 Pac. R. 637, 56 Am. R. 119.) *Kirby v. Western Union Telegraph Co.*, 4 S. Dak. 105, 55 N. W. R. 759, 46 Am. St. R. 765; *Pacific Telegraph Co. v. Underwood*, 37 Neb. 315, 55 N. W. R. 1057, 40 Am. St. R. 490; *State v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. R. 257, 85 Am. St. R. 870; *Leonard v. New*

common carriers to the extent that they are insurers against mistakes in transmitting messages. The instrumentalities by which they perform their service are subject to danger from accident, atmospheric conditions and the malice of strangers; and they have no such immediate custody of the message as the common carrier has of the goods he carries.

They have in other cases been spoken of as bailees for hire bound to exercise ordinary care. But they receive nothing tangible to carry, and as will appear are held to more than ordinary care.

§ 384. Are quasi-bailees.—But the nature of their undertaking is closely analogous to that of common carriers. The one transports to a distance the contents of a letter, the other transports a package, and both perform the service in the exercise of a public calling. Though their duties differ yet their profession, liability and legal status are practically the same as those of carriers of passengers.

It is natural therefore that most of the rules of law governing telegraph companies should be adaptations of the law of carriers already noticed. But the law of electricity is of such recent growth and the likenesses and differences of common carriers and telegraph companies have been so variously emphasized in different jurisdictions, that on many points

York etc. Telegraph Co. 41 N. Y. 544, 1 Am. R. 446; [171] Grinnell v. Western Union Telegraph Co., 113 Mass. 299, 18 Am. R. 485; [185] Mentzer v. Western Union Telegraph Co., 93 Ia. 752, 62 N. W. R. 1, 57 Am. St. R. 294; Smith v. Western Union Telegraph Co., 83 Ky. 104, 4 Am. St. R. 126; Birney v. New York etc. Telegraph Co., 18 Md. 341, 81 Am. D. 607; [168] True v. International Telegraph Co., 60 Me. 9, 11 Am. R. 156; Tyler v. Western Union Telegraph Co., 60 Ill. 421, 14 Am. R. 38; Western Union Telegraph Co. v. Reynolds, 77 Va. 173, 46 Am. R. 715; Reed v. Western Union Telegraph Co., 135 Mo. 661, 37 S. W. R. 904, 58 Am. St. R. 609; [167] Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. R. 500.

§ 384. Gillis v. Western Union Telegraph Co., 61 Vt. 461, 17 Atl. R. 736, 15 Am. St. R. 917; [167] Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. R. 500; So. Exp. Co. v. Caldwell, 21 Wall. (U. S.) 264; Western Union Telegraph Co. v. Reynolds, 77 Va. 173, 46 Am. R. 715; Western Union Telegraph Co. v. Call Co., 44 Neb. 326, 62 N. W. R. 506, 48 Am. St. R. 729; [168] True v. International Telegraph Co., 60 Me. 9, 11 Am. R. 156; Western Union Telegraph Co. v. Neill, 57 Tex. 283, 44 Am. R. 589; Smith v. Western Union Telegraph Co., 83 Ky. 104, 4 Am. St. R. 126; [185] Mentzer v. Western Union Telegraph Co., 93 Ia. 752, 62 N. W. R. 1, 57 Am. St. R. 294.

decisions are in conflict, on others confusion reigns, and the law of electricity as a whole may well be regarded as still in process of formation.

2. THE RIGHTS AND DUTIES OF TELEGRAPH COMPANIES AS CARRIERS.

§ 385. The rights and duties of telegraph companies as carriers may be conveniently considered under the following heads:

- (1) Right to compensation.
- (2) Right to make reasonable rules and regulations.
- (3) Duty to serve all indiscriminately.
- (4) Duty to furnish facilities.
- (5) Liability for mistakes in transmission.
- (6) Liability for delay or failure to deliver.

§ 386. (1) **Right to compensation.**—As a matter of course the telegraph company can not be compelled to perform its service without reasonable compensation and it may demand payment before it undertakes the service, or by undertaking without prepayment it may waive that right, and then it cannot collect until the service has been performed. The compensation may be graduated to the service rendered, the rates having relation to the length of the message and the distance it is carried, and more may be charged for day than for night messages, for messages that are repeated to insure correct transmission than for unrepeatd messages.

§ 387. — **Discrimination.**—But having devoted its property to a public use the telegraph company must serve the public impartially. It must, unless there be a reasonable

§ 386. Western Union Telegraph Co. v. Call Co., 44 Neb. 326, 62 N. W. R. 506, 48 Am. St. R. 729; [172] Western Union Telegraph Co. v. Van Cleave, 107 Ky. 464, 54 S. W. R. 827, 92 Am. St. R. 366; Western Union Telegraph Co. v. Moore, 12 Ind. App. 136, 39 N. E. R. 874, 54 Am. St. R. 515; Kirby v. Western Union Telegraph Co., 4 S. Dak. 105, 55 N. W. R. 759, 46 Am. St. R. 765; [167] Ayer v. Western Union Telegraph Co., 79 Me. 493, 10 Atl. R. 495, 1 Am. St. R. 353.

§ 387. Western Union Telegraph Co. v. Call Co., 44 Neb. 326, 62 N. W. R. 506, 48 Am. St. R. 729; Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. R. 822, 75 Am. St. R. 184; Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co., 61 Vt. 241, 17 Atl. R. 1071, 15 Am. St. R. 893; [173] Leavell v. Western Union Telegraph Co., 116 N. C. 211, 21 S. E. R. 391, 47 Am. St. R. 798.

ground of discrimination, serve all persons alike upon their tender of equal pay for equal services and must not render to one service at a less rate than to another where such discrimination operates to the disadvantage of the other. By the better opinion a discrimination based merely on the quantity of business offered is unjust, tends to create a monopoly and destroy competition, and is therefore contrary to public policy. But it is not unjust discrimination to make a difference in rates based on the expense and difficulty of performing the service.

§ 388. (2) **Right to make rules and regulations.**—"That telegraph companies may make all proper and needful rules to enable them with convenience and dispatch to do the business of their customers is now unquestioned." Such rules however by reason of the quasi-public character of telegraph companies the law requires to be "reasonable in view of all the circumstances, and of the nature of the business, its risks and responsibilities, the necessity of securing to the public a reasonable protection against neglect or fraud or want of due care and effort, to perform punctually and correctly the acts undertaken." Not only must the rules be reasonable, but they must be reasonably applied in every case. Of the reasonableness of any rule the court and not the company is the judge.

§ 389. —**Notice of rules.**—Regulations affecting the rights of the sender are not binding unless brought home to his knowledge. His assent to mere regulations is not neces-

§ 388. *Bartlett v. Western Union Telegraph Co.*, 62 Me. 209, 16 Am. R. 437; [168] *True v. International Telegraph Co.*, 60 Me. 9, 11 Am. R. 156; [172] *Western Union Telegraph Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. R. 827, 92 Am. St. R. 366; *Western Union Telegraph Co. v. Moore*, 12 Ind. App. 136, 39 N. E. R. 874, 54 Am. St. R. 515; *Western Union Telegraph Co. v. Reynolds*, 77 Va. 173, 46 Am. R. 715; *Telephone Co. v. Brown*, 104 Tenn. 56, 78 Am. St. R. 906.

§ 389. *Breece v. United States Telegraph Co.*, 48 N. Y. 132, 8 Am. R. 526; *Western Union Telegraph*

Co. v. Reynolds, 77 Va. 173, 46 Am. R. 715; *Harris v. Western Union Telegraph Co.*, 121 Ala. 519, 25 So. R. 910, 77 Am. St. R. 70; *So. Exp. Company v. Caldwell*, 21 Wall. (U. S.) 264; *Bartlett v. Western Union Telegraph Co.*, 62 Me. 209, 16 Am. R. 437; [170] *Webbe v. Western Union Telegraph Co.*, 169 Ill. 610, 48 N. E. R. 670, 61 Am. St. R. 207 and extended note; *Hendricks v. Western Union Telegraph Co.*, 126 N. C. 304, 78 Am. St. R. 658; *Telephone Co. v. Brown*, 104 Tenn. 56, 78 Am. St. R. 906; *Hill v. Western Union Telegraph Co.*, 85 Ga. 425, 11 S. E. R. 874, 21 Am.

sary, though it is otherwise as to stipulations affecting his contract relations with the company. The same considerations control the contract rights against the company of the sendee of the message, but he is not bound in a tort action by regulations assented to by the sender of which he had no notice.

These regulations are usually printed on blanks on which the sender is required to write his message. A party using such a blank assents to its terms so far as they are reasonable, whether he knows them or not. An omission to inform himself of the rules with full opportunity to do so is his own fault. But a rule made without notice, and not observed by the company itself, can not avail, and if the company waives its rules it can not plead them in defence.

§ 390. — **What regulations are reasonable.**—It is almost universal to include among the rules printed on telegraph blanks conditions under which the company undertakes to perform the service. Such are the offer of half rates for night messages on condition that the company shall be freed

St. R. 166. As to the necessity of knowledge compare the rule in *United States Telegraph Co. v. Gildersleeve*, 29 Md. 232, 96 Am. D. 519, with the general rule in *Carland v. Western Union Telegraph Co.*, 118 Mich. 369, 76 N. W. R. 762, 74 Am. St. R. 394.

§ 390. The following are cases illustrating regulations that have been held valid: *Breece v. United States Telegraph Co.*, 48 N. Y. 132, 8 Am. R. 526; *Western Union Telegraph Co. v. Reynolds*, 77 Va. 173, 46 Am. R. 715; *Birkett v. Western Union Telegraph Co.*, 103 Mich. 361, 61 N. W. R. 645, 50 Am. St. R. 374; *Hill v. Western Union Telegraph Co.*, 85 Ga. 425, 11 S. E. R. 874, 21 Am. St. R. 166; [172] *Western Union Telegraph Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. R. 827, 92 Am. St. R. 366; *Harris v. Western Union Telegraph Co.*, 121 Ala. 519, 25 So. R. 910, 77 Am. St. R. 70; *Western Union Telegraph Co. v. Henderson*, 89 Ala. 510, 7 So. R.

419, 18 Am. St. R. 148; *McPeck v. Western Union Telegraph Co.*, 107 Iowa 356, 78 N. W. R. 63, 70 Am. St. R. 205; *Western Union Telegraph Co. v. Stevenson*, 128 Pa. St. 442, 18 Atl. R. 441, 15 Am. St. R. 687; *Sweetland v. Illinois & Mississippi Telegraph Co.*, 27 Iowa 433, 1 Am. R. 285.

In the following cases regulations have been held not binding on the party suing the company: *Bartlett v. Western Union Telegraph Co.*, 62 Me. 209, 16 Am. R. 437; [170] *Webbe v. Western Union Telegraph Co.*, 169 Ill. 610, 48 N. E. R. 670, 61 Am. St. R. 207; [168] *True v. International Telegraph Co.*, 60 Me. 9, 11 Am. R. 156; *Western Union Telegraph Co. v. Moore*, 12 Ind. App. 136, 39 N. E. R. 874, 54 Am. St. R. 515; *Western Union Telegraph Co. v. Eubanks*, 100 Ky. 591, 38 S. W. R. 1068, 66 Am. St. R. 361. See also note to 92 Am. St. R. 372.

from liability for negligence as to transmission or delivery of the message; a requirement that all claims be presented in writing within sixty days; that messages whose accuracy in transmission is to be guaranteed shall be repeated at an additional charge of one-half the regular rate; that an extra charge shall be paid for delivery outside the free delivery limits. Rules as to hours of business and conduct of the office are proper, if reasonable in view of the public nature of the business.

In passing upon the reasonableness of regulations the courts are in hopeless conflict. By the weight of authority it is reasonable to require claims to be filed in writing within sixty days, but it is unreasonable to refuse responsibility for unrepeated messages.

§ 391. (3) **Duty to serve all impartially.**—It is the duty of telegraph companies to transmit messages for individuals and corporations faithfully and impartially in the order in which they are offered for transmission. All customers must be treated with the same consideration. The telegraph and the telephone are “public vehicles of intelligence, and they who own and control them can no more refuse to perform impartially the functions that they have assumed to discharge than a railway company as a common carrier can rightfully refuse to perform its duty to the public. They have no power to discriminate and while offering to serve some refuse to serve others.”

Neither can they refuse to receive a dispatch which is free from indecency and improper language on account of its subject matter, unless to send it might subject the company to civil or criminal liability. To refuse such a dispatch is not a wrong resting on contract, but it grows out of the duty

§ 391. Chesapeake etc. Telephone Co. v. Baltimore & Ohio Telegraph Co., 66 Md. 399, 7 Atl. R. 809, 59 Am. R. 167; Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co., 61 Vt. 241, 17 Atl. R. 1071, 15 Am. St. R. 893; [167] Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. R. 500; Western Union Telegraph Co. v. Dubois, 128 Ill. 248, 21 N. E. R. 4, 15 Am.

St. R. 109; Tyler v. Western Union Telegraph Co., 60 Ill. 421, 14 Am. R. 38; Gray v. Western Union Telegraph Co., 87 Ga. 350, 13 S. E. R. 562, 27 Am. St. R. 259; [173] Leavell v. Western Union Telegraph Co., 116 N. C. 211, 21 S. E. R. 391, 47 Am. St. R. 798; [185] Mentzer v. Western Union Telegraph Co., 93 Ia. 752, 62 N. W. R. 1, 57 Am. St. B. 294.

owed by a public service corporation to render service to all indiscriminately.

§ 392. (4) Duty to provide adequate facilities.—Another consequence of the public employment of the telegraph company is its duty to provide facilities adequately to serve the public. It is the duty of the company to maintain wires and operators enough to transact all the business offered it, for all the points at which it has offices, but it can not be required to furnish greater facilities than the volume of business reasonably to be expected at any office justly demands.

It is also bound to have suitable instruments and skilled operators and servants who will render the service with that degree of diligence and skill which the peculiar nature of the undertaking requires. For any failure due to defective instruments or unskillful operators the company is responsible as it is for the acts of servants who are negligent or unfaithful while in the course of their employment.

§ 393. (5) Liability for mistakes in transmission.—The most important consequence of the peculiar nature of the profession and undertaking of the telegraph company and of the intimate dependence of the public upon the proper fulfillment of its functions as a carrier of intelligence, often

§ 392. [173] *Leavell v. Western Union Telegraph Co.*, 116 N. C. 211, 21 S. E. R. 391, 47 Am. St. R. 798; *Birkett v. Western Union Telegraph Co.*, 103 Mich. 361, 61 N. W. R. 645, 50 Am. St. R. 374; [172] *Western Union Telegraph Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. R. 827, 92 Am. St. R. 366; *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421, 14 Am. R. 38; *Fowler v. Western Union Telegraph Co.*, 80 Me. 381, 15 Atl. R. 29, 6 Am. St. R. 211; *Sweetland v. Illinois & Mississippi Telegraph Co.*, 27 Iowa 433, 1 Am. R. 285; *McCord v. Western Union Telegraph Co.*, 39 Minn. 181, 39 N. W. R. 315, 12 Am. St. R. 636.

§ 393. *Fowler v. Western Union Telegraph Co.*, 80 Me. 381, 15

Atl. R. 29, 6 Am. St. R. 211; *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421, 14 Am. R. 38; [167] *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. R. 500; *Reed v. Western Union Telegraph Co.*, 135 Mo. 661, 37 S. W. R. 904, 58 Am. St. R. 609; *Western Union Telegraph Co. v. Chamblee*, 122 Ala. 428, 25 S. R. 232, 82 Am. St. R. 89; [170] *Webbe v. Western Union Telegraph Co.*, 169 Ill. 610, 48 N. E. R. 670, 61 Am. St. R. 207; *Western Union Telegraph Co. v. Eubanks*, 100 Ky. 591, 38 S. W. R. 1068, 66 Am. St. R. 361; *Western Union Telegraph Co. v. Neill*, 57 Tex. 283, 44 Am. R. 589; [185] *Mentzer v. Western Union Telegraph Co.*, 93 Ia. 752, 62 N. W. R. 1, 57 Am. St. R. 294.

of vital importance to the sender and sendee, is that they are held to a rigid accountability for the negligence of their agents and employees.

They are not insurers of the safe and accurate transmission and prompt delivery of messages received by them, but they are bound to perform their service with a care and diligence proportioned to their profession of special skill and commensurate with the importance of the trust reposed in them. Any failure to exercise such care and skill is negligence for which the carrier is liable, but no responsibility is assumed for errors or imperfections arising from causes not within their control and not capable of being guarded against.

§ 394. —Limiting liability for negligence by contract.— Conditions limiting the liability of the company if assented to by the sender are universally upheld unless they excuse from liability for negligence. But to allow the company by

§ 394. *Gillis v. Western Union Telegraph Co.*, 61 Vt. 461, 17 Atl. R. 736, 15 Am. St. R. 917; [169] *Ayer v. Western Union Telegraph Co.*, 79 Me. 493, 10 Atl. R. 495, 1 Am. St. R. 353; *Bartlett v. Western Union Telegraph Co.*, 62 Me. 209, 16 Am. R. 437; [167] *Telegraph Co. v. Griswold*, 37 Ohio St. 301, 41 Am. R. 500; *So. Exp. Company v. Caldwell*, 21 Wall. (U. S.) 264; *Western Union Telegraph Co. v. Eubanks*, 100 Ky. 591, 38 S. W. R. 1068, 66 Am. St. R. 361; [170] *Webbe v. Western Union Telegraph Co.*, 169 Ill. 610, 48 N. E. R. 670, 61 Am. St. R. 207; *Western Union Telegraph Co. v. Blanchard*, 68 Ga. 299, 45 Am. R. 480 and note; *Pacific Telegraph Co. v. Underwood*, 37 Neb. 315, 55 N. W. R. 1057, 40 Am. St. R. 490; [168] *True v. International Telegraph Co.*, 60 Me. 9, 11 Am. R. 156; *Western Union Telegraph Co. v. Graham*, 1 Colo. 230, 9 Am. R. 136; *Smith v. Western Union Telegraph Co.*, 83 Ky. 104, 4 Am. St. R. 126; *Manville v. Western Union Telegraph Co.*, 37 Iowa

214, 18 Am. R. 8; *Sweetland v. Illinois & Mississippi Telegraph Co.*, 27 Iowa 433, 1 Am. R. 285; *Brown v. Postal Telegraph Co.*, 111 N. C. 187, 16 S. E. R. 179, 32 Am. St. R. 793 (overruling 89 N. C. 334); *Reed v. Western Union Telegraph Co.*, 135 Mo. 661, 37 S. W. R. 904, 58 Am. St. R. 609 (overruling 37 Mo. 472); *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421, 14 Am. R. 38; *Candee v. Western Union Telegraph Co.*, 34 Wis. 471, 17 Am. R. 452; *Western Union Telegraph Co. v. Tyler*, 74 Ill. 168, 24 Am. R. 279.

Contra: [171] *Grinnell v. Western Union Telegraph Co.*, 113 Mass. 299, 18 Am. R. 485; *Birkett v. Western Union Telegraph Co.*, 103 Mich. 361, 61 N. W. R. 645, 50 Am. St. R. 374; *Pearsall v. Western Union Telegraph Co.*, 124 N. Y. 256, 26 N. E. R. 534, 21 Am. St. R. 662; *Western Union Telegraph Co. v. Neill*, 57 Tex. 283, 44 Am. R. 589; *United States Telegraph Co. v. Gildersleve*, 29 Md. 232, 96 Am. D. 519.

stipulations on the message blank or other agreement with the sender to escape this rigid liability for negligence is by the weight of authority contrary to public policy, and such stipulations demand unreasonable concessions and are void. While the art of telegraphy was in its infancy and its appliances were crude, many courts upheld stipulations against liability for errors that have since overruled their earlier decisions and laid down the more rigid rule. Regulations exempting a carrier from liability for negligence are in some cases held to be void for want of consideration. In some states constitutional or statutory provisions forbid contracts against the liability for negligence of telegraph companies.

Those states that permit a common carrier to contract against negligence (§ 269), naturally extend the same privilege to telegraph companies. But there are a number of states which deny such immunity to common carriers, that have nevertheless permitted telegraph companies to contract against liability for negligence at least if the acts causing the injury did not amount to gross negligence, wilful misconduct or fraud.

The law of the telegraph is comparatively new, and is still in process of formation. The present tendency is toward applying the same principles in contracts against negligence to carriers of intelligence as have been settled upon in the case of common carriers of goods and of passengers, and it is difficult to justify any distinction, though it is still maintained in a few states.

§ 395. (6) **Liability for delay or failure to deliver.**—The undertaking of the telegraph company is not only to transmit with reasonable care and dispatch but to deliver the message to the sendee without neglect or unnecessary delay. No dis-

§ 395. *Barnes v. Western Union Telegraph Co.*, 24 Nev. 125, 50 Pac. R. 438, 77 Am. St. R. 791; *Western Union Telegraph Co. v. Moore*, 12 Ind. App. 136, 39 N. E. R. 874, 54 Am. St. R. 515; [174] *Harkness v. Western Union Telegraph Co.*, 73 Ia. 190, 34 N. W. R. 811, 5 Am. St. R. 672; *Smith v. Western Union Telegraph Co.*, 83 Ky. 104, 4 Am. St. R. 126; *Western Union Telegraph Co. v. Eubanks*, 100 Ky. 591, 38 S. W. R. 1068, 66 Am. St. R. 361; *Western Union Telegraph Co. v. Broesche*, 72 Tex. 654, 10 S. W. R. 734, 13 Am. St. R. 843; *Western Union Telegraph Co. v. Henderson*, 89 Ala. 510, 7 So. R. 419, 18 Am. St. R. 148; *Francis v. Western Union Telegraph Co.*, 58 Minn. 252, 59 N. W. R. 1078, 49 Am. St. R. 507.

tion is to be drawn between the duty to receive and transmit and that to promptly deliver the message when transmitted. As speed is a first consideration in communicating by telegraph it results naturally that any negligence in prompt service should be regarded as a serious default.

Though stipulations against liability for errors in unrepeat-
ed messages have been upheld in some of the states, it is universally conceded that such exemptions are no defence against delay or failure to deliver an unrepeat-
ed message unless the cause of the delay would have been removed by a repetition. Those courts that deny the right to stipulate against negligence in transmitting also deny the right of exemption from liability for negligent delay.

3. TERMINATION OF THE RELATION.

§ 396. **Delivery where.**—The relation is ordinarily terminated by delivery of the message. Within free delivery limits delivery should be made to the addressee in person wherever by reasonable diligence he can be found. It is of first importance that the message should be delivered to the addressee and the place of delivery is of minor importance. The place to which the message is directed is but a guide and if the addressee can not be found at that address he should be sought at his office or residence. In the case of important telegrams it may be the duty of the messenger to seek him on the street or elsewhere if there is reason to suppose he can be found. In such a case failure to use reasonable efforts to make personal delivery is negligence for which the company is liable.

If the company undertakes to transmit a message to one outside the free delivery limits it must perform, but an extra

§ 396. *Western Union Telegraph Co. v. Houghton*, 82 Tex. 561, 17 S. W. R. 846, 27 Am. St. R. 918 and note; *McPeak v. Western Union Telegraph Co.*, 107 Iowa 356, 78 N. W. R. 63, 70 Am. St. R. 205; *Hendershot v. Western Union Telegraph Co.*, 106 Ia. 529, 76 N. W. R. 828, 68 Am. St. R. 313; compare *Western Union Telegraph Co. v. Henderson*, 89 Ala. 510, 7 So. R. 419, 18 Am. St. R. 148 with *Western Union Telegraph Co. v. Moore*, 12 Ind. App. 136, 39 N. E. R. 874, 54 Am. St. R. 515; see also [175] *Western Union Telegraph Co. v. Mitchell*, 91 Tex. 454, 44 S. W. R. 274, 66 Am. St. R. 906; *Western Union Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. R. 598, 10 Am. St. R. 772.

charge may be made./ Whether the burden of knowing whether the sendee lives within such limits rests on the sender or on the company is in dispute. If the sender fails to give sufficient address his contributory negligence will prevent a recovery by him for failure to deliver.

§ 397. **Delivery to whom.**—Delivery to the person intended is essential to the service by the company, is part of the contract for transmission. An undelivered message is not transmitted. In general the delivery should be personal but delivery to one in whose care the message is sent is sufficient, and if the addressee is stopping at a hotel the hotel clerk is presumed to be his agent to receive the message. If the addressee can not be found the sender should if it is practicable be notified that the message can not be delivered.

§ 398. **Delivery to connecting lines.**—Telegraph lines have so far consolidated that questions of liability as between connecting carriers are comparatively rare. Practically the same considerations as to the duty to receive and liability for loss that have been already noticed in discussing connecting carriers of goods (§ 290 and the following) are recognized in the case of connecting telegraph lines.

Telephone Companies.

§ 399. **Telegraph and telephone companies alike** occupy a quasi-public position and for many purposes the word "telegraph" in a law has been held to include "telephone," and

§ 397. [175] *Western Union Telegraph Co. v. Mitchell*, 91 Tex. 454, 44 S. W. R. 274, 66 Am. St. R. 906; *Western Union Telegraph Co. v. Houghton*, 82 Tex. 561, 17 S. W. R. 846, 27 Am. St. R. 918, note; *Western Union Telegraph Co. v. Young*, 77 Tex. 245, 13 S. W. R. 985, 19 Am. St. R. 751; *Laudie v. Western Union Telegraph Co.*, 126 N. C. 431, 35 S. E. R. 810, 78 Am. St. R. 668; *Hendricks v. Western Union Telegraph Co.*, 126 N. C. 304, 35 S. E. R. 543, 78 Am. St. R. 658.

§ 398. *Smith v. Western Union Telegraph Co.*, 84 Tex. 359, 19 S. W. R. 441, 31 Am. St. R. 59 and note and cases cited; *Telephone Co. v. Brown*, 104 Tenn. 56, 78 Am. St. R. 906.

§ 399. [176] *Central Union Telephone Co. v. Falley*, 118 Ind. 194, 20 N. E. R. 145, 10 Am. St. R. 114, and extended note; *State v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. R. 257, 85 Am. St. R. 870; *Hudson River Telephone Co. v. Watervliet etc. Railway Co.*, 135 N. Y. 393, 32 N. E. R. 148, 31 Am. St. R. 838; *San Antonio etc. Railway Co. v. South Western Telegraph & Telephone Co.*, 93 Tex. 313, 55 S. W. R. 117, 77 Am. St. R. 884.

"telegram" to include a "telephone message." Telegraph law is therefore equally the law of the telephone, except in so far as the difference in the nature of the services rendered and in the manner of rendering them necessitates a difference. Even in such matters, the applications rather than the foundation principles differ.

§ 400. **Not a common carrier.**—The telephone has often been referred to as a common carrier of news, but such expressions must be understood to mean no more than it is a common carrier, just as a telegraph company is a common carrier, in that it is engaged in carrying news as a public calling, but not in that it is an insurer of its service.

§ 401. **Duty to serve all impartially.**—As the telephone has been devoted to a public use, it has become charged with a public interest and must submit to public control for the common good. It is bound to serve the public indiscriminately and can not serve one and refuse another. One discriminated against may by mandamus compel the company to furnish him service like that furnished to others.

§ 402. **Patent subject to public control.**—The right to serve and refuse service at the will of the company has been urged upon the ground that the telephone is a patent under the

§ 400. *State v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. R. 257, 85 Am. St. R. 870; *Hockett v. State*, 105 Ind. 250, 5 N. E. R. 178, 55 Am. R. 201; [176] *Central Union Telephone Co. v. Falley*, 118 Ind. 194, 20 N. E. R. 145, 10 Am. St. R. 114; *State v. Nebraska Telephone Co.*, 17 Neb. 126, 22 N. W. R. 237, 52 Am. R. 404; *Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co.*, 61 Vt. 241, 17 Atl. R. 1071, 15 Am. St. R. 893.

§ 401. [176] *Central Union Telephone Co. v. Falley*, 118 Ind. 194, 20 N. E. R. 145, 10 Am. St. R. 114; *Chesapeake & Potomac Telephone Co. v. Baltimore & Ohio Telegraph Co.*, 66 Md. 399, 7 Atl. R. 809, 59 Am. R. 167; *State v. Ne-*

braska Telephone Co., 17 Neb. 126, 22 N. W. R. 237, 52 Am. R. 404; *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. R. 583; *Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co.*, 61 Vt. 241, 17 Atl. R. 1071, 15 Am. St. R. 893; *State v. Citizens' Telephone Co.*, 61 S. C. 83, 39 S. E. R. 257, 85 Am. St. R. 870.

§ 402. *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. R. 583; *Hockett v. State*, 105 Ind. 250, 5 N. E. R. 178, 55 Am. R. 201; *Chesapeake & Potomac Telephone Co. v. Baltimore & Ohio Telegraph Co.*, 66 Md. 399, 7 Atl. R. 809, 59 Am. R. 167; *Commercial Union Telegraph Co. v. New England Telephone & Telegraph Co.*, 61 Vt. 241, 17 Atl. R. 1071, 15 Am. St. R. 893.

control of the patentee. That is true in so far that it prevents others from using his invention without his consent, but when his use of his invention requires public patronage and state aid, as in the use of the right of eminent domain, then the patent becomes impressed with the public use and interest and subject to reasonable public control for the public good.

§ 403. **Right to regulate charges.**—It is another result of the public calling of the telephone company that the charges for its service are subject to legislative control in fixing a reasonable maximum rate, as is permitted in the case of all property charged with a public use, and the company can not evade such regulation by making separate charges for the various pieces of the transmitting and receiving instruments.

§ 403. *Hockett v. State*, 105 Ind. 113; [176] *Central Union Telephone Co. v. Falley*, 118 Ind. 194, 20 N. E. R. 178, 55 Am. R. 201; [70] *Munn v. Illinois*, 94 U. S. N. E. R. 145, 10 Am. St. R. 114.

PART V.

OF ACTIONS AGAINST CARRIERS.

CHAPTER XVI.

THE ACTION AND THE DAMAGES.

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| <p>§ 404. Classification.</p> <p style="padding-left: 20px;"><i>A. Actions against common carriers of goods.</i></p> <p style="padding-left: 40px;">1. <i>The parties to the action.</i></p> <p>405. The proper party plaintiff.</p> <p>406. Contract action.</p> <p>407. —Consignor agent of consignee.</p> <p>408. Tort action.</p> <p style="padding-left: 20px;"><i>2. The action.</i></p> <p>409. The form of the action.</p> <p>410. Action <i>ex delicto</i>.</p> <p>411. Action <i>ex contractu</i>.</p> <p>412. Modern procedure.</p> <p style="padding-left: 20px;"><i>3. The pleadings.</i></p> <p>413. Show case or assumpt.</p> <p style="padding-left: 40px;">4. <i>The evidence.</i></p> <p>414. Burden of proof.</p> <p style="padding-left: 40px;">5. <i>The damages.</i></p> <p>415. For injury or loss.</p> <p>416. Proximate cause.</p> <p>417. The measure of damages.</p> <p>418. —Value how determined.</p> <p>419. For default in carrying.</p> <p>420. —Expected profits.</p> <p style="padding-left: 20px;"><i>B. Actions against carriers of passengers.</i></p> <p style="padding-left: 40px;">1. <i>The parties.</i></p> <p>421. The injured party.</p> <p style="padding-left: 40px;">2. <i>The form of the action.</i></p> <p>422. The choice of action.</p> <p style="padding-left: 40px;">3. <i>The pleadings.</i></p> | <p>§ 423. Special damages specially pleaded.</p> <p style="padding-left: 20px;">4. <i>The evidence.</i></p> <p>424. Burden of proof.</p> <p style="padding-left: 20px;">5. <i>The damages.</i></p> <p>425. Compensation for the injury.</p> <p>426. Damages for wrongful ejection.</p> <p>427. Damages for mental suffering and fright alone.</p> <p>428. Exemplary damages.</p> <p style="padding-left: 20px;"><i>C. Actions against carriers of intelligence.</i></p> <p style="padding-left: 40px;">a. <i>Carriers of mail.</i></p> <p>429. No action maintainable.</p> <p style="padding-left: 40px;">b. <i>Telegraph and Telephone companies.</i></p> <p style="padding-left: 60px;">1. <i>Parties to the action.</i></p> <p style="padding-left: 60px;">2. <i>Form of action.</i></p> <p>430. Contract or tort action.</p> <p>431. An action on the contract.</p> <p>432. A tort action.</p> <p style="padding-left: 20px;">3. <i>The pleadings.</i></p> <p>433. Governed by general rules.</p> <p style="padding-left: 20px;">4. <i>The evidence.</i></p> <p>434. Burden of proof.</p> <p style="padding-left: 20px;">5. <i>The damages.</i></p> <p>435. Measure of damages.</p> <p>436. Duty to disclose importance of message.</p> <p>437. Damages for mental suffering and injury to feelings.</p> |
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§ 404. **Classification.**—In the preceding chapters the rules of actions against carriers have been incidentally mentioned but of necessity in a fragmentary and desultory way. It seems proper therefore to supplement this by an orderly, but very brief, view of the leading principles of actions in so far as there are peculiarities in actions against carriers. For full treatment of actions the student is referred to a work on pleading.

It is convenient to consider separately

- A. Actions against common carriers of goods.
- B. Actions against carriers of passengers.
- C. Actions against carriers of intelligence.

Under each brief notice will be taken of

- 1. The parties to the action.
- 2. The form of the action.
- 3. The pleadings.
- 4. The evidence.
- 5. The damages.

A. ACTIONS AGAINST COMMON CARRIERS OF GOODS.

1. *The Parties to the Action.*

§ 405. **The proper party plaintiff.**—The party defendant in an action is of course the carrier who undertakes the service. In determining who is the proper party plaintiff in an action against a carrier it is of the first importance to determine the form of the action to be brought. When the remedy is sought in an action on the contract it must be in the name of the party to the contract, but when a tort action is brought for the breach of a common law duty to carry it may be brought in the name of any party having a beneficial interest in the performance of that duty.

§ 406. **Contract action.**—The consignor usually makes the contract of affreightment. To him therefore the carrier is responsible for the fulfillment of its terms, and he is a proper

§ 405. Hutchinson on Carriers, Corporation, 112 Mass. 524, 17 Am. R. 128; [76] Union Freight R.R. Co. 720-736.

§ 406. Blanchard v. Page, 8 Gray v. Winkley, 159 Mass. 133, 34 N. E. (Mass.) 281; Wooster v. Tarr, 8 Allen (Mass.) 270, 85 Am. D. 707; Chicago & Northwestern Railway [177] Fian v. Western Railroad Co., 27 Wis. 81, 9 Am. R. 439; South.

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party plaintiff in an action against the carrier for the breach of a contract of affreightment made with such consignor. If the real interest in the property remained in him he is the only proper party to sue, but if he acted for the consignee in shipping the goods as for example in cases where he has sold the goods to the consignee and received the price, then any recovery by him he holds in trust for the consignee.

§ 407. —**Consignor agent of consignee.**—Presumptively the consignee is the owner of the goods at whose risk they are carried, and in contracting for their shipment the consignor acts as his agent. If such be the case the consignee, as the party for whose benefit the contract was made, has a right to sue for its breach, and his right, if he choose to exercise it, is paramount to that of the consignor. A recovery against the carrier by either is a bar to an action by the other. The assignee of a bill of lading of course stands in the shoes of the consignee, his assignor.

The presumption that the consignee is the owner may be rebutted, and if it be shown that he had no property, general or special, in the goods, and incurred no risk in their transportation, he can not maintain an action against the carrier.

§ 408. **Tort action.**—Any party having a beneficial interest in the performance of the common law duty to carry may sue in tort for the carrier's failure to perform, and also for a refusal to carry made to such party or his agent. His right or interest in the property gives him a right to insist that the

ern Express Co. v. Caperton, 44 Ala. 101, 4 Am. R. 118; Sisson v. Cleveland & Toledo Railroad Co., 14 Mich. 489, 90 Am. D. 252; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. D. 54.

§ 407. Hooper v. Chicago & North Western Railway Co., 27 Wis. 81, 9 Am. R. 439; [122] Dyer v. Great Northern Railway Co., 51 Minn. 345, 53 N. W. R. 714, 38 Am. St. R. 506; Southern Express Co. v. Craft, 49 Miss. 480, 19 Am. R. 4; [177] Finn v. Western Railroad Corporation, 112 Mass. 524, 17 Am. R. 128; Murray v. Warner, 55 N. H. 546, 20 Am. R. 227; Thompson v. Fargo, 49 N. Y.

188, 10 Am. R. 342; Krudler v. Ellison, 47 N. Y. 36, 7 Am. R. 402; Southern Express Co. v. Caperton, 44 Ala. 101, 4 Am. R. 118.

§ 408. [177] Finn v. Western Railroad Corporation, 112 Mass. 524, 17 Am. R. 128; Murray v. Warner, 55 N. H. 546, 20 Am. R. 227; [79] New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. (U. S.) 344; Elkins v. Boston & Maine Railroad Co., 19 N. H. 337, 51 Am. D. 184; Ralph v. Chicago & North Western Railway Co., 32 Wis. 177, 14 Am. R. 725. Compare Lockhart v. Western & Atlantic Railroad Co., 73 Ga. 472, 54 Am. R. 883.

carrier shall perform the duty imposed upon him by law, or respond in damages for failing therein.

The owner then may always sue in tort for loss, injury or detention of the goods, and in contract if he is directly, or by agent, a party to the contract. And this he may do though he was undisclosed to the carrier, and though he was not the general owner, but had a mere special property, such as that of a bailee. In the latter case he of course recovers for the benefit of the general owner.

2. *The Action.*

§ 409. The form of the action against the carrier depends on the nature of the complaint. A breach of the carrier's common law duty is a tort for which an action on the case will lie. For breach of a special contract the action must be in assumpsit on that contract. Where the old rules of pleading are still in force it often becomes important to choose between the action *ex delicto* and one *ex contractu*.

§ 410. — **Action ex delicto.**—If there be doubt as to the proper parties defendant the tort action is preferable, as recovery may be had against all or any part of the defendants in a tort action. Liability of joint tort feorsors is several and nonjoinder or misjoinder can not defeat the action as to the parties actually sued.

A declaration in case moreover does not require the same certainty of pleading as in assumpsit, and finally the measure of damages in some cases is larger in a tort action, covering the full loss and sometimes punitive damages as well.

§ 411. — **The action ex contractu** has the advantage that with the declaration on contract may be joined the common counts in assumpsit. Furthermore, the action *ex contractu* survives to the personal representative of the plaintiff.

But a count in trover can not be joined with assumpsit, and failure to join all parties who are jointly liable for the wrong is fatal to an action *ex contractu*.

§ 412. — **Modern procedure** in most of the states has

§ 410. Hutchinson on Carriers, 740-742. § 412. Hutchinson on Carriers, 746-748.

§ 411. Hutchinson on Carriers, 743.

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assimilated tort and contract actions to the same rules. Yet occasionally, even now, it is important to sue upon contract rather than upon the common law duty. This is so where the carrier has by special contract undertaken some duty not imposed by law. For breach of this duty the suit must be upon the contract.

On the other hand it is better to sue for breach of the common law duty where as is usually the case the contract of shipment limits the liability of the carrier. This throws upon the carrier the burden of pleading and proof of such special terms.

3. *The Pleadings.*

§ 413. **Show case or assumpsit.**—Even under modern practice codes it is important to know whether the plaintiff sues for breach of duty or of contract, as the nature of the defence may depend upon the form of the declaration. If breach of duty is relied on this duty must be set out with particularity and its violation and the resulting damage must be averred.

If the suit be upon the contract it must be set out verbatim or according to its legal effect. Some codes require a description of the contract accompanied by its profert or exhibit. Such description and exhibit will of course be conclusive that the plaintiff had elected to rely upon the contract.

Without further mention in this connection the usual rules of pleading are to be understood as applicable to actions against carriers.

4. *The Evidence.*

§ 414. **Burden of proof.**—The only departure from the ordinary rules of evidence calling for remark in this connection is that the burden of proving the cause of the injury or loss rests, not upon the party affirming the loss, but upon the carrier.

§ 413. *Hutchinson on Carriers*, Indiana Railroad Co., 16 Mich. 79, 749; *Tallehassee Falls Mfg. Co. v. Western Railway Co.*, 117 Ala. 520, 23 So. R. 139, 67 Am. St. R. 179, note.

§ 414. *Hutchinson on Carriers*, 93 Am. D. 208; *Turney v. Wilson*, 7 Yerg. (Tenn.) 340, 27 Am. D. 515; *Tallehassee Falls Mfg. Co. v. Western Railway Co.*, 117 Ala. 520, 23 So. R. 139, 67 Am. St. R. 179 and note; *Lamb v. Camden & Amboy etc. Co.*, 46 N. Y. 271, 7 Am. R. 327. Compare *Shriver v. Sioux City & St.*

The plaintiff must prove delivery to the carrier, the carrier's undertaking and the loss or damage. To excuse himself the carrier then rests under the burden of showing that the loss was caused by one of the excepted perils, or that it was due to a cause from which he is by contract excused.

Whether the carrier must go farther and establish his own freedom from negligence is a disputed question.

5. *The Damages.*

§ 415. **For injury or loss** the damages recoverable have been said to depend on the nature of the action. The tortfeasor is liable for "all the injurious consequences of his tortious act, which, according to the usual course of events and the general experience, were likely to ensue." It does not matter that he did not actually contemplate the resulting injury as the probable consequence of his wrongful act.

For the breach of the contract the damages extend only "to the direct consequences of the breach; to such as usually occur from the breach of such a contract, and as were within the contemplation of the parties, when the contract was entered into, as likely to result from a breach." The greater foresight, at the time of the breach, of the defaulting party as to the probable consequences of his act will not increase his responsibility in contract, but in tort it does. This distinction is often ignored and it is sometimes denied that the character of the wrong declared upon can affect the damages.

§ 416. —**Proximate cause.**—The default of the carrier must have been the proximate cause of the injury. For losses

Paul Railway Co., 24 Minn. 506, 31 Am. R. 353; Hull v. Chicago etc. Railway Co., 41 Minn. 510, 43 N. W. R. 391, 16 Am. St. R. 722; Adams Express Co. v. Stettaners, 61 Ill. 184, 14 Am. R. 57.

§ 415. Compare Hutchinson on Carriers, 768 b (quoting Sutherland on Damages), and 5 Am. & Eng. Ency. of Law, 394; see also [178] Savannah etc. Railway Co. v. Pritchard, 77 Ga. 412, 1 S. E. R. 261, 4 Am. St. R. 92; Swift River Co. v. Fitchburg Railroad Co., 169

Mass. 326, 47 N. E. R. 1015, 61 Am. St. R. 288; Brown v. Chicago, Milwaukee & St. Paul Railway Co., 54 Wis. 342, 11 N. W. R. 356, 41 Am. R. 41; Brock v. Gale, 14 Fla. 523, 14 Am. R. 356.

§ 416. Hadley v. Baxendale, 9 Exch. 341; Griffin v. Colver, 16 N. Y. 489, 69 Am. D. 718; [178] Savannah etc. Railway Co. v. Pritchard, 77 Ga. 412, 1 S. E. R. 261, 4 Am. St. R. 92; Brown v. Chicago, Milwaukee & St. Paul Railway Co., 54 Wis. 342, 11 N. W. R. 356, 41 Am.

that are remote, speculative or possible merely there can be no recovery. But for losses due to its default the carrier is liable if they are the usual and natural consequences of such default, or can fairly be said to have been within the contemplation of the parties at the time the contract of shipment was made as the natural and probable consequences of such default provided the losses are the proximate and not the remote consequences of the default, and are certain in their nature and not speculative and contingent. In tort the carrier is liable for all the natural and proximate results of the wrongful act complained of whether reasonably expected or not.

§ 417. The measure of damages for loss or injury is, in general, the value of the goods at the destination with interest on such value from the time when they should have been delivered, together with any other loss of which the carrier's fault was the proximate cause. From this must be deducted any unpaid charges of the carrier and any value the goods may have had if accepted in an injured condition. The same rule applies where the carrier has been guilty of conversion. Goods so injured as to be practically worthless need not be accepted at all.

§ 418. —Value how determined.—The value of the goods is ordinarily the market value or the cost of obtaining other goods of like kind. Embarrassment is met in framing a

- R. 41; Swift River Co. v. Fitchburg Railroad Co., 169 Mass. 326, 47 N. E. R. 1015, 61 Am. St. R. 288; Brock v. Gale, 14 Fla. 523, 14 Am. R. 356; Harvey v. Connecticut etc. Railroad Co., 124 Mass. 421, 26 Am. R. 673; Deming v. Grand Trunk Railway Co., 48 N. H. 455, 2 Am. R. 267; Ward v. New York Central Railroad Co., 47 N. Y. 29, 7 Am. R. 405; [185] Mentzer v. Western Union Telegraph Co., 93 Iowa 752, 62 N. W. R. 1, 57 Am. St. R. 294.
- § 417. McGregor v. Kilgore, 6 Ohio 358, 27 Am. D. 260; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. D. 349; [179] Cooper v. Young, 22 Ga. 269, 68 Am. D. 502; Harvey v. Connecticut etc. Railroad Co., 124 Mass. 421, 26 Am. R. 673; Bowman v. Teall, 23 Wend. (N. Y.) 306, 35 Am. D. 562; Hand v. Baynes, 4 Whart. (Pa.) 204, 33 Am. D. 54.
- § 418. Hudson v. Northern Pacific Railway Co., 92 Iowa 231, 60 N. W. R. 608, 54 Am. St. R. 550; [179] Cooper v. Young, 22 Ga. 269, 68 Am. D. 502; Sisson v. Cleveland & Toledo Railroad Co., 14 Mich. 489, 90 Am. D. 252; Jones v. St. Louis, Iron Mountain & Southern Railway Co., 53 Ark. 27, 13 S. W. R. 416, 22 Am. St. R. 175; [180] Green v. Boston & Lowell Railroad Co., 128 Mass. 221, 35 Am. R. 370; Fairfax v. New York Central Railroad Co.,

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proper rule of damages for property having special value to the owner, but no market value. It has been said that it is compensated at the actual value to the owner, not at a fanciful price but at the actual money loss he sustains, and that of this value only a jury can be the judges. No rule has been suggested that is definite, satisfactory and logical. The effect of fixing the value in the contract of shipment has been previously discussed (§ 270).

§ 419. The measure of damages for default in carrying, either because of delay, or failure or refusal to carry at all, is the difference between the market value of the goods at the place where they were to be delivered and at the time they should have arrived and their value when they did arrive or at the place where they were refused. To this should be added interest from the time when they should have been delivered, and such other damages as result proximately from the carrier's default. This will include reasonable expenses of the owner incurred in trying to prevent loss including any reasonable charges that may have been paid to other carriers to perform the service for which the defendant carrier is in default.

§ 420. Expected profits from a business can not be recovered.

73 N. Y. 167, 29 Am. R. 119; Houston & Texas Central Railroad Co. v. Burke, 55 Tex. 323, 40 Am. R. 808. Compare Watt v. Nevada Central Railroad Co., 23 Nev. 154, 44 Pac. R. 423, 46 Pac. R. 52, 726, 62 Am. St. R. 772 with note to the same, 62 Am. St. R. 791.

§ 419. [178] Savannah etc. Railway Co. v. Pritchard, 77 Ga. 412, 1 S. E. R. 261, 4 Am. St. R. 92; [179] Cooper v. Young, 22 Ga. 269, 68 Am. D. 502; Deming v. Grand Trunk Railway Co., 48 N. H. 455, 2 Am. R. 267; Ward v. New York Central Railroad Co., 47 N. Y. 29, 7 Am. R. 405; Hudson v. Northern Pacific Railway Co., 92 Iowa 231, 60 N. W. R. 608, 54 Am. St. R. 550; Ward's etc. Co. v. Elkins, 34 Mich. 439; Devereaux v. Buckley, 34 Ohio St. 16, 32 Am. R. 342;

Chicago Railroad Co., 26 Ill. 205, 79 Am. D. 369; Griffin v. Colver, 16 N. Y. 489, 69 Am. D. 718; Foard v. Atlantic & North Carolina Railroad Co., 8 Jones's L. (N. C.) 235, 78 Am. D. 277; [179] Cooper v. Young, 22 Ga. 269, 68 Am. D. 502; Harvey v. Connecticut etc. R. R. Co., 124 Mass. 421, 26 Am. R. 673; [85] Ayres v. Chicago & North Western Railway Co., 71 Wis. 372, 37 N. W. R. 432, 5 Am. St. R. 226; Missouri Pacific Railroad Co. v. Fagan, 72 Tex. 127, 9 S. W. R. 749, 13 Am. St. R. 776; [67] Galena etc. Railroad Co. v. Rae, 18 Ill. 488, 68 Am. D. 574; Sisson v. Cleveland & Toledo Railroad Co., 14 Mich. 489, 90 Am. D. 252; Peet v. Chicago & North Western Railway Co., 20 Wis. 594, 91 Am. D. 446.

§ 420. Swift River Co. v. Fitchburg Railroad Co., 169 Mass. 326,

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ered where they are speculative and uncertain, or where the carrier had no notice that such damages might ensue from his non-performance. But profits that are certain, and that may fairly be said to have been within the contemplation of the parties may be recovered.

B. ACTIONS AGAINST CARRIERS OF PASSENGERS.

1. *The Parties.*

§ 421. The injured party at the common law was the proper person to bring an action for personal injuries. For loss of services because of such injuries the master, parent or husband might maintain an action.

If the injury caused death there was no right of action, as all right to services ceased at death. Lord Campbell's Act, however, in various forms, has been enacted in all the states but not by the federal congress. According to its provisions the right of action for injury causing death survives to the personal representative of the deceased. Actions under these statutes must be governed strictly by the statutes, and the action will be defeated if brought by any other person than the party named in the statute.

2. *The Form of Action.*

§ 422. The choice of action is governed largely by the same considerations as those already noted in actions against carriers

47 N. E. R. 1015, 61 Am. St. R. 288; [178] Savannah etc. Railway Co. v. Pritchard, 77 Ga. 412, 1 S. E. R. 261, 4 Am. St. R. 92; [179] Cooper v. Young, 22 Ga. 269, 68 Am. D. 502; Rocky Mount Mills v. Wilmington etc. Railroad Co., 119 N. C. 693, 25 S. E. R. 854, 56 Am. St. R. 682; Priestley v. Northern Indiana & Chicago Railroad Co., 26 Ill. 205, 79 Am. D. 369; Foard v. Atlantic & North Carolina Railroad Co., 8 Jones's L. (N. C.) 235, 78 Am. D. 277; Brock v. Gale, 14 Fla. 523, 14 Am. R. 356.

§ 421. Kelley v. New York, New Haven & Hartford Railroad Co., 168 Mass. 308, 46 N. E. R. 1063, 60 Am.

St. R. 397; Morgan v. Southern Pacific Co., 95 Cal. 510, 30 Pac. R. 603, 29 Am. St. R. 143; [181] Louisville etc. Railway Co. v. Goodykoontz, 119 Ind. 111, 21 N. E. R. 472, 12 Am. St. R. 371 and note; Usher v. West Jersey Railroad Co., 126 Pa. St. 206, 17 Atl. R. 597, 12 Am. St. R. 863; Dwyer v. Chicago etc. Railway Co., 84 Iowa 479, 51 N. W. R. 244, 35 Am. St. R. 322; Hawkins v. Front Street Cable Co., 3 Wash. 592, 28 Pac. R. 1021, 28 Am. St. R. 72; McDonald v. Chicago & North Western Railway Co., 26 Iowa 124, 96 Am. D. 114; Carey v. Berkshire Railroad Co., 1 Cush. (Mass.) 475, 48 Am. D. 616 and note.

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of goods. If exemplary or punitive damages are desired the declaration must be in case for the tort of the carrier.

3. *The Pleadings.*

§ 423. **Special damages** because of the plaintiff's station in life, business, or relation to members of a dependent family, must be specially pleaded. But if an injury be set forth injuries naturally and proximately flowing from it need not be specially alleged.

4. *The Evidence.*

§ 424. **Burden of proof.**—Proof of injury to a passenger raises no such presumption of liability against the carrier as was noted in the case of the carriage of goods. The passenger carrier is liable only when guilty of negligence and the plaintiff must prove facts or conditions from which it is reasonable to infer negligence before there is a *prima facie* case against the carrier. Proving defects in the vehicle, collision of trains, etc., will raise a presumption of negligence which the carrier is then called upon to rebut.

Whether the carrier has the burden of proving that the passenger was guilty of contributory negligence is in dispute but the weight of authority is that he must. Proof that the carrier was free from negligence of course releases him from liability.

§ 422. *Brown v. Chicago, Milwaukee & St. Paul Railway Co.*, 54 Wis. 342, 11 N. W. R. 356, 41 Am. R. 41; *Walsh v. Chicago, Milwaukee & St. Paul Railway Co.*, 42 Wis. 23, 24 Am. R. 376; *Spellman v. Richmond & Danville Railroad Co.*, 35 S. C. 475, 14 S. E. R. 947, 28 Am. St. R. 858.

§ 423. [134] *Williams v. Oregon Short Line Railroad Co.*, 18 Utah 210, 54 Pac. R. 991, 72 Am. St. R. 777.

§ 424. [153] *Meier v. Pennsylvania Railroad Co.*, 64 Pa. St. 225, 3 Am. R. 581; *Hawkins v. Front Street Cable Railroad Co.*, 3 Wash. 592, 28 Pac. R. 1021, 28 Am. St. R. 72; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb. 890, 55 N. W. R. 270, 38 Am. St. R. 753; *Louis-*

ville, New Albany & Chicago Railway Co. v. Snyder, 117 Ind. 435, 20 N. E. R. 284, 10 Am. St. R. 60; *Mitchell v. Chicago & Grand Trunk Railway Co.*, 51 Mich. 236, 16 N. W. R. 388, 47 Am. R. 566; *Pennsylvania Railroad Co. v. Raiordon*, 119 Pa. St. 577, 13 Atl. R. 324, 4 Am. St. R. 670; [131] *Warren v. Fitchburg Railroad Co.*, 8 Allen (Mass.) 227, 85 Am. D. 700; *Deyo v. New York Central Railroad Co.*, 34 N. Y. 9, 88 Am. D. 418, note; *Philadelphia etc. Railroad Co. v. Anderson*, 72 Md. 519, 20 Atl. R. 2, 20 Am. St. R. 490, note; *Alabama Great Southern Railroad Co. v. Frazier*, 93 Ala. 45, 9 So. R. 303, 30 Am. St. R. 28 and note at page 40, see also note to 43 Am. D. 363.

5. *The Damages.*

§ 425. Compensation for the injury is the measure of damages to a passenger who has suffered from the negligence or wrongful act of the carrier. This includes inconvenience, loss of time, pecuniary loss, medical expenses, and pain and suffering of mind and body, past and also future, if such future suffering seems reasonably inevitable.

Future damages caused by diminution of earning power, or in case of death, earnings during the probable duration of life, are properly considered as well as the number and station of those dependent on the deceased.

But all damages must be the natural and proximate consequence of the injury. Whether sickness and disease following the injury are so caused by it as to be within the rule of proximate cause depends partly on the circumstances and partly on the jurisdiction where the case is tried. Some courts are more liberal than others in their view of what is to be included as a proximate result.

§ 426. Damages for wrongful ejection from the train, or for rightful ejection with unnecessary force or in an improper

- § 425. *Goodhart v. Pennsylvania Railroad Co.*, 177 Pa. St. 1, 35 Atl. R. 191, 55 Am. St. R. 705; [159] *Filer v. New York Central Railroad Co.*, 49 N. Y. 47, 10 Am. R. 327; *McDonald v. Chicago & North Western Railway Co.*, 26 Iowa 124, 96 Am. D. 114; *Brown v. Chicago, Milwaukee & St. Paul Railway Co.*, 54 Wis. 342, 11 N. W. R. 356, 41 Am. R. 41; *Barker v. Ohio River Railroad Co.*, 51 W. Va. 423, 41 S. E. R. 148, 90 Am. St. R. 808; *Louisville, New Albany & Chicago Railway Co. v. Snyder*, 117 Ind. 435, 20 N. E. R. 284, 10 Am. St. R. 60; *Terre Haute etc. Railroad Co. v. Buck*, 96 Ind. 346, 49 Am. R. 168; *Turner v. Great Northern Railway Co.*, 15 Wash. 213, 46 Pac. R. 243, 55 Am. St. R. 883; [181] *Louisville etc. Railway Co. v. Goodykoontz*, 119 Ind. 111, 21 N. E. R. 472, 12 Am. St. R. 371, note; *Georgia Railroad Co. v. Hayden*, 71 Ga., 518, 51 Am. R. 274; *McHugh v. Schlosser*, 159 Pa. St. 480, 28 Atl. R. 291, 39 Am. St. R. 699; *Dwyer v. Chicago etc. Railway Co.*, 84 Ia. 479, 51 N. W. R. 244, 35 Am. St. R. 322; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 30 Pac. R. 603, 29 Am. St. R. 143; *Pennsylvania Railroad Co. v. Books*, 57 Pa. St. 339, 98 Am. D. 229; *Hansley v. Jamesville etc. Railroad Co.*, 115 N. C. 602, 20 S. E. R. 528, 44 Am. St. R. 474; *Gulf, Colorado & Santa Fe Railway Co. v. Hayter*, 93 Tex. 239, 54 S. W. R. 944, 77 Am. St. R. 856; *Hawkins v. Front Street Cable Co.*, 3 Wash. 592, 28 Pac. R. 1021, 28 Am. St. R. 72; see also the extended note to 85 Am. St. R. 835 and 70 Am. St. R. 669.
- § 426. *Kansas City Railroad Co. v. Foster*, 134 Ala. 244, 32 S. R.

manner, include compensation for expenses actually incurred, for the loss of time and interruption of business, for bodily suffering and for mental pain caused by the injury to feelings, annoyance, vexation and humiliation resulting from the indignity.

If the ejection has been accompanied by insulting treatment or by wilful, wanton or malicious conduct on the part of the carrier's servants, such conduct may properly be considered as aggravating the injury and increasing the damages.

§ 427. Damages for mental suffering or fright alone, neither accompanied nor followed by physical injury are never allowed. On the other hand if physical injuries are accompanied by mental pain or fright the damages may cover the consequences of the mental as well as of the physical suffer-

- 773, 92 Am. St. R. 25; *Cleveland etc. Railway Co. v. Kinsley*, 27 Ind. App. 135, 60 N. E. R. 169, 87 Am. St. R. 245; [142] *Forsee v. Alabama Great Southern Railroad Co.*, 63 Miss. 66, 56 Am. R. 801; *Hot Springs Railroad Co. v. Deloney*, 65 Ark. 177, 45 S. W. R. 351, 67 Am. St. R. 913; *Gillingham v. Ohio River Railroad Co.*, 35 W. Va. 588, 14 S. E. R. 243, 29 Am. St. R. 827; *Jeffersonville Railroad Co. v. Rogers*, 28 Ind. 1, 92 Am. D. 276; *Duggan v. Baltimore & Ohio Railroad Co.*, 159 Pa. St. 248, 28 Atl. R. 182, 39 Am. St. R. 672; *Georgia Railroad & Banking Co. v. Eskew*, 86 Ga. 641, 12 S. E. R. 1061, 22 Am. St. R. 490; [182] *Carsten v. Northern Pacific Railroad Co.*, 44 Minn. 454, 47 N. W. R. 49, 20 Am. St. R. 589; *Hansley v. Jamesville etc. Railroad Co.*, 115 N. C. 602, 20 S. E. R. 528, 44 Am. St. R. 474; *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 31 Pac. R. 1112, 33 Am. St. R. 157; *Pittsburg etc. Railway Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. R. 712, 60 Am. St. R. 706; *Philadelphia etc. Railroad Co. v. Larkin*, 47 Md. 155, 28 Am. R. 442; *Du Laurans v. St. Paul & Pacific Railroad Co.*, 15 Minn. 49, 2 Am. R. 102.
- § 427. *Mitchell v. Rochester Railway Co.*, 151 N. Y. 107, 45 N. E. R. 354, 56 Am. St. R. 604; [183] *Spade v. Lynn & Boston Railroad Co.*, 168 Mass. 285, 47 N. E. R. 88, 60 Am. St. R. 393, 172 Mass. 488, 52 N. E. R. 747, 70 Am. St. R. 298; *Turner v. Great Northern Railway Co.*, 15 Wash. 213, 46 Pac. R. 243, 55 Am. St. R. 883; *Goodhart v. Pennsylvania Railroad Co.*, 177 Pa. St. 1, 35 Atl. R. 191, 55 Am. St. R. 705; *Morgan v. Southern Pacific Co.*, 95 Cal. 510, 30 Pac. R. 603, 29 Am. St. R. 143; *Hot Springs Railroad Co. v. Deloney*, 65 Ark. 177, 45 S. W. R. 351, 67 Am. St. R. 913; *Contra, Gulf, Colorado & Santa Fe Railway Co. v. Hayter*, 93 Tex. 239, 54 S. W. R. 944, 77 Am. St. R. 856; see note at p. 859, *Trigg v. St. Louis etc. Railroad Co.*, 74 Mo. 147, 41 Am. R. 305; [185] *Mentzer v. Western Union Telegraph Co.*, 93 Ia. 752, 62 N. W. R. 1, 57 Am. St. R. 294; *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 695, 8 S. W. R. 574, 6 Am. St. R. 864; see *post*, sec. 437.

ing. All are part of the injury. But by the weight of authority there can be no recovery for fright, not accompanied but followed by physical injuries, both because such physical injuries are regarded as too remote and uncertain to be a proper element of damage, and because allowance of them would open the door to a flood of litigation over imaginary and fictitious claims. Some of the courts have adopted a broader rule and have allowed damages even in this last case.

§ 428. **Exemplary damages.**—The cases can not be reconciled as to the circumstances that justify, in addition to compensatory damages, an allowance by way of "smart money." It is a general rule that for the wanton, wilful, malicious or recklessly negligent conduct of the carrier, or of his agents or servants in the course of their employment, the law allows not only damages by way of compensation for the injury but also exemplary damages as a salutary example to induce upon the part of carriers that regard for human life and personal safety which the law so highly regards and so carefully protects.

C. ACTIONS AGAINST CARRIERS OF INTELLIGENCE.

a. Carriers of the Mails.

§ 429. No action can be maintained against the Post Office Department, as the government can not be sued, and a private person has no action against a contractor for carrying the mail, since he is employed and owes his duty to the government to which alone he is responsible (§ 379).

§ 428. *Goddard v. Grand Trunk Railway Co.*, 57 Me. 202, 2 Am. R. 39; *Spellman v. Richmond & Danville Railroad Co.*, 35 S. C. 475, 14 S. E. R. 947, 28 Am. St. R. 858 and extended note; *Gillingham v. Ohio River & Railroad Co.*, 35 W. Va. 588, 14 S. E. R. 243, 29 Am. St. R. 827; *Frink v. Coe*, 4 G. Green (Iowa) 555, 61 Am. D. 141; *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 31 Pac. R. 1112, 33 Am. St. R. 157; *Pittsburg etc. Railway Co. v. Lyon*, 123 Pa. St. 140, 16 Atl. R. 607, 10 Am. St. R. 517, note; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. R. 232; *Hansley v. Jamesville etc. Railroad Co.*, 115 N. C. 602, 20 S. E. R. 528, 44 Am. St. R. 474; *Barker v. Ohio River Railroad Co.*, 51 W. Va. 423, 41 S. E. R. 148, 90 Am. St. R. 808; *Philadelphia etc. Railroad Co. v. Larkin*, 47 Md. 155, 28 Am. R. 442, see also note to 59 Am. St. R. 602.

b. Telegraph and Telephone Companies.

1. *The Parties to the Action.* 2. *The Form of the Action.*

§ 430. **Contract or tort action.**—Actions against telegraph companies may be on the contract to transmit the message, or in tort for breach of the duty the company owes the public to serve all impartially and faithfully. Actions against telephone companies as carriers usually arise over refusal to furnish service. The use of mandamus to compel the telephone company to fulfill its public function in such cases has already been sufficiently explained (§ 401).

§ 431. **An action on the contract** may be maintained by the sender, for he, as principal or agent, makes the contract with the company and may hold it to a faithful performance of the agreement. Moreover any one for whose benefit the sender made the contract is in effect a principal, disclosed or undisclosed, and as such is a proper party plaintiff in an action on the contract made by his agent on his behalf.

It has been said, with less reason, that the telegraph company is the agent of the party who selects that means of communication. If therefore the sendee has so selected the telegraph company then the company is liable to him as an agent to his principal. And by some courts this principle is extended to cases generally and it is said that the addressee who has suffered actual damage may sue the telegraph company as his agent.

§ 431. [174] *Harkness v. Western Union Telegraph Co.*, 73 Iowa 190, 34 N. W. R. 811, 5 Am. St. R. 672; *Western Union Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. R. 857, 16 Am. St. R. 920; *Wadsworth v. Western Union Telegraph Co.*, 86 Tenn. 695, 8 S. W. R. 574, 6 Am. St. R. 864; *Western Union Telegraph Co. v. Henderson*, 89 Ala. 510, 7 So. R. 419, 18 Am. St. R. 148; [169] *Ayer v. Western Union Telegraph Co.*, 79 Me. 493, 10 Atl. R. 495, 1 Am. St. R. 353; *Western Union Telegraph Co. v. Wilson*, 93 Ala. 32, 9 So. R. 414, 30 Am. St. R. 23; *Shingleur v. Western Union Telegraph Co.*, 72 Miss. 1030, 18 So. R. 425, 48 Am. St. R. 604; *Carland v. Western Union Telegraph Co.*, 118 Mich. 369, 76 N. W. R. 762, 74 Am. St. R. 394; [185] *Mentzer v. Western Union Telegraph Co.*, 93 Iowa 752, 62 N. W. R. 1, 57 Am. St. R. 294; *Coit v. Western Union Telegraph Co.*, 130 Cal. 657, 63 Pac. R. 83, 80 Am. St. R. 153; *Butler v. Western Union Telegraph Co.*, 62 S. C. 222, 40 S. E. R. 162, 89 Am. St. R. 893; *United States Telegraph Co. v. Gildersleve*, 29 Md. 232, 96 Am. D. 519.

In England the addressee is held not to be a party to the contract, and therefore he can not sue upon it, but in this country that view has never prevailed. There is so great diversity of view as to the ground upon which an action can be brought that general statements are difficult, but the above seem to be the most rational explanations of the contract relations of the parties.

§ 432. A tort action may be maintained by any one to whom the company owes the duty of correct transmission and prompt delivery. When, therefore, it undertakes to deliver a message to an addressee it is liable for legal injuries to him, and also to the sender, and to any third party who is the real party in interest, for the faithful performance of the duty undertaken. But this does not extend to third parties who may or may not have an interest in the message, who are strangers to the company, and to whom it owes no duty; nor does it extend to any one who has suffered no legal wrong.

3. *The Pleadings.*

§ 433. Governed by general rules.—No special mention of the pleadings in actions against telegraph companies is called for. The general rules of pleading control.

4. *The Evidence.*

§ 434. Burden of proof.—Error or delay in transmitting a message raises a presumption of negligence which casts upon the company the burden of proving that the fault was due

§ 432. *Western Union Telegraph Co. v. Dubois*, 128 Ill. 248, 21 N. E. R. 4, 15 Am. St. R. 109; [170] *Webbe v. Western Union Telegraph Co.*, 169 Ill. 610, 48 N. E. R. 670, 61 Am. St. R. 207; *Gray v. Telegraph Co.*, 108 Tenn. 39, 64 S. W. R. 1063, 91 Am. St. R. 706; *Pegram v. Western Union Telegraph Co.*, 100 N. C. 28, 6 S. E. R. 770, 6 Am. St. R. 557; *Western Union Telegraph Co. v. Henderson*, 89 Ala. 510, 7 So. R. 419, 18 Am. St. R. 148; *Coit v. Western Union Telegraph Co.*, 130 Cal. 657, 63 Pac. R. 83, 80 Am. St. R. 153; *Butler v. Western Union Telegraph Co.*, 62 S. C. 222, 40 S. E. R. 162, 89 Am. St. R. 893; *Young v. Western Union Telegraph Co.*, 107 N. C. 370, 11 S. E. R. 1044, 22 Am. St. R. 883; *Clay v. Western Union Telegraph Co.*, 81 Ga. 285, 6 S. E. R. 813, 12 Am. St. R. 316; *Shingleur v. Western Union Telegraph Co.*, 72 Miss. 1030, 18 So. R. 425, 48 Am. St. R. 604.

§ 434. [169] *Ayer v. Western Union Telegraph Co.*, 79 Me. 493, 10 Atl. R. 495, 1 Am. St. R. 353; [167] *Telegraph Co. v. Griswold*, 37

to causes beyond its control, or of showing that it exercised all proper care and diligence commensurate with the undertaking.

Some cases hold that, when the company assumes liability for errors only in case the message is repeated, that in the case of unrepeatd messages the burden is on the plaintiff to show that the errors were due to negligence. In such case a mere error is not *prima facie* evidence of negligent transmission.

5. The Damages.

§ 435. The measure of damages for loss due to the negligence of the company is the damage sustained. This may include the price paid for the message and any other injury which flowed proximately and naturally from the default, and which is certain and not speculative and contingent in its nature (sec. 416). Exemplary damages may be added where malice or aggravating circumstances are shown.

Illustrations of damages allowed because of a mistake in the telegram or a delay in its transmission are: loss of time or expense incurred, loss of a claim against a debtor, loss of an opportunity to buy or sell property, purchase at an increased or a sale at a decreased price, and loss or destruction

Ohio St. 301, 41 Am. R. 500; [174] Harkness v. Western Union Telegraph Co., 73 Ia. 190, 34 N. W. R. 811, 5 Am. St. R. 672; Fowler v. Western Union Telegraph Co., 80 Me. 381, 15 Atl. R. 29, 6 Am. St. R. 211; Western Union Telegraph Co. v. Crall, 38 Kan. 679, 17 Pac. R. 309, 5 Am. St. R. 795; Western Union Telegraph Co. v. Dubois, 128 Ill. 248, 21 N. E. R. 4, 15 Am. St. R. 109; Reed v. Western Union Telegraph Co., 135 Mo. 661, 37 S. W. R. 904, 58 Am. St. R. 609; Hendricks v. Western Union Telegraph Co., 126 N. C. 304, 78 Am. St. R. 658; Tyler v. Western Union Telegraph Co., 60 Ill. 421, 14 Am. R. 38.

Contra: United States Telegraph Co. v. Gildersleeve, 29 Md. 232, 96 Am. D. 519; Sweetland v. Illinois & Mississippi Telegraph Co., 27 Iowa

433, 1 Am. R. 285; Aiken v. Western Union Telegraph Co., 69 Iowa, 31, 28 N. W. R. 419, 58 Am. R. 210; Western Union Telegraph Co. v. Neill, 57 Tex. 283, 44 Am. R. 589; Womack v. Western Union Telegraph Co., 58 Tex. 176, 44 Am. R. 614.

§ 435. Smith v. Western Union Telegraph Co., 83 Ky. 104, 4 Am. St. R. 126; Pegram v. Western Union Telegraph Co., 100 N. C. 28, 6 S. E. R. 770, 6 Am. St. R. 557; [169] Ayer v. Western Union Telegraph Co., 79 Me. 493, 10 Atl. R. 495, 1 Am. St. R. 353; [174] Harkness v. Western Union Telegraph Co., 73 Iowa 190, 34 N. W. R. 811, 5 Am. St. R. 672; Western Union Telegraph Co. v. Reynolds, 77 Va. 173, 46 Am. R. 715; Squire v. Western Union Telegraph Co., 98 Mass. 232,

of property. But damages cannot be recovered for a failure to gain possible, but uncertain profits. It is always the duty of the injured party to use all reasonable diligence to avoid or lessen the damages.

§ 436. **Duty to disclose importance of message.**—The decisions are squarely in conflict as to the liability for loss when the company was not informed of the special importance of the message and of the loss that may result for default in its proper transmission and delivery. The authorities agree that the loss must result naturally, and in the usual course of business from failure to send or deliver the dispatch correctly or promptly. But they differ as to what results are natural and in the usual course of business.

One line of decisions holds that there is a presumption when the parties resort to the telegraph that they have mat-

93 Am. D. 157; *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421, 14 Am. R. 38; *Manville v. Western Union Telegraph Co.*, 37 Iowa 214, 18 Am. R. 8; *McPeck v. Western Union Telegraph Co.*, 107 Iowa, 356, 78 N. W. R. 63, 70 Am. St. R. 205; *Barnes v. Western Union Telegraph Co.*, 24 Nev. 125, 50 Pac. R. 438, 77 Am. St. R. 791; *Western Union Telegraph Co. v. Dubois*, 128 Ill. 248, 21 N. E. R. 4, 15 Am. St. R. 109; *Reed v. Western Union Telegraph Co.*, 135 Mo. 661, 37 S. W. R. 904, 58 Am. St. R. 609; *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. R. 783, 10 Am. St. R. 699; *Western Union Telegraph Co. v. Sheffield*, 71 Tex. 570, 10 S. W. R. 752, 10 Am. St. R. 790; *Alexander v. Western Union Telegraph Co.*, 66 Miss. 161, 5 So. R. 397, 14 Am. St. R. 556; *Gulf etc. Railway Co. v. Loonie*, 82 Tex. 323, 18 S. W. R. 221, 27 Am. St. R. 891; *Clay v. Western Union Telegraph Co.*, 81 Ga. 285, 6 S. E. R. 813, 12 Am. St. R. 316; [168] *True v. International Telegraph Co.*, 60 Me. 9, 11 Am. R. 156; *Western Union Telegraph Co. v. Graham*, 1 Colo. 230,

9 Am. R. 136; *Shingleur v. Western Union Telegraph Co.*, 72 Miss. 1030, 18 So. R. 425, 48 Am. St. R. 604. As to a telephone company see *Cumberland Telephone and Telegraph Co. v. Hurdon*, — Ky. —, 60 L. R. A. 849.

§ 436. The following cases illustrate the first rule: *Pepper v. Telegraph Co.*, 87 Tenn. 554, 11 S. W. R. 783, 10 Am. St. R. 699; *Western Union Telegraph Co. v. Edsall*, 74 Tex. 329, 12 S. W. R. 41, 15 Am. St. R. 835; *Western Union Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. R. 857, 16 Am. St. R. 920; *Postal Telegraph Co. v. Lathrop*, 131 Ill. 575, 23 N. E. R. 583, 19 Am. St. R. 55; *Hendershott v. Western Union Telegraph Co.*, 106 Iowa 529, 76 N. W. R. 828, 68 Am. St. R. 313; *Davis v. Western Union Telegraph Co.*, 107 Ky. 527, 54 S. W. R. 849, 92 Am. St. R. 371; [168] *True v. International Telegraph Co.*, 60 Me. 9, 11 Am. R. 156; *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421, 14 Am. R. 38; *Western Union Telegraph Co. v. Reynolds*, 77 Va. 173, 46 Am. R. 715, note; *Daugherty v.*

ters of importance, especially if the message shows on its face that it relates to a commercial transaction or other important matter. The unimportant message is to be regarded as the exception and not the rule, and if the company desires fuller information it should seek it.

But the weight of authority is that, if the message is in cipher or does not on its face show that it relates to transactions of importance, the rule of *Hadley v. Baxendale* applies, and the company is not liable for special losses unless their agent was informed of the importance of the message when it was offered for transmission.

§ 437. **Damages for mental suffering and injury to feelings** resulting from default in delivering a telegram, by the weight of authority, can not be recovered, unless there is other substantial injury which is aggravated by the sufferings of the mind. The rule has already been stated (sec. 427) as applied to carriers of passengers. But there are many cases, and the

American Union Telegraph Co., 75 Ala. 168, 51 Am. R. 435; *Western Union Telegraph Co. v. Hyer*, 22 Fla. 637, 1 Am. St. R. 222.

Contra, *Smith v. Western Union Telegraph Co.*, 83 Ky. 104, 4 Am. St. R. 126; [184] *Ferguson v. Anglo-American Telegraph Co.*, 178 Pa. St. 377, 35 Atl. R. 979, 56 Am. St. R. 770; *Baldwin v. United States Telegraph Co.*, 45 N. Y. 744, 6 Am. R. 165; *Candee v. Western Union Telegraph Co.*, 34 Wis. 471, 17 Am. R. 452; *Hubbard v. Western Union Telegraph Co.*, 33 Wis. 558, 14 Am. R. 775; *United States Telegraph Co. v. Gildersleeve*, 29 Md. 232, 96 Am. D. 519; *Western Union Telegraph Co. v. Wilson*, 32 Fla. 527, 37 Am. St. R. 125 (overruling *Hyer* case, *supra*).

§ 437. For liability: [185] *Mentzer v. Western Union Telegraph Co.*, 93 Iowa 752, 62 N. W. R. 1, 57 Am. St. R. 294; [172] *Western Union Telegraph Co. v. Van Cleave*, 107 Ky. 464, 54 S. W. R. 827, 92 Am. St. R. 366;

Wadsworth v. Western Union Telegraph Co., 86 Tenn. 695, 8 S. W. R. 574, 6 Am. St. R. 864; *Graham v. Western Union Telegraph Co.* (1903), — La. Ann. — 34 S. R. 91; *Western Union Telegraph Co. v. Cooper*, 71 Tex. 507, 9 S. W. R. 598, 10 Am. St. R. 772, and extended note; *Western Union Telegraph Co. v. Nations*, 82 Tex. 539, 18 S. W. R. 709, 27 Am. St. R. 918, note; *Western Union Telegraph Co. v. Wilson*, 93 Ala. 32, 9 So. R. 414, 30 Am. St. R. 23. (Compare *Western Union Telegraph Co. v. Ayers*, 131 Ala. 391, 31 S. R. 78, 90 Am. St. R. 92.) *Butler v. Western Union Telegraph Co.*, 62 S. C. 222, 40 S. E. R. 162, 89 Am. St. R. 893, note; *Young v. Western Union Telegraph Co.*, 107 N. C. 370, 11 S. E. R. 1044, 22 Am. St. R. 883.

Contra, *Francis v. Western Union Telegraph Co.*, 58 Minn. 252, 59 N. W. R. 1078, 49 Am. St. R. 507; [186] *West v. Western Union Telegraph Co.*, 39 Kan. 93, 17 Pac. R. 807, 7 Am. St. R. 530; *Chapman*

number is growing, in which it is held that the very purpose of a telegram may be a mere matter of feelings, and that as the company undertakes a duty with reference to such feelings it is justly chargeable with the direct and proximate results of failure faithfully to perform such duty.

The most serious objection to such an extension of the rule is the uncertainty of the damage, the opportunity for fraud and the encouragement to litigation. Though the weight of authority is still against it, the modern tendency is marked toward the broader view which makes the company liable for the breach according to the nature of the contract, and which often furnishes the only basis for damages in cases where the company has been guilty of the grossest dereliction of duty.

v. Western Union Telegraph Co., 88 Ga. 763, 15 S. E. R. 901, 30 Am. St. R. 183; Morton v. Western Union Telegraph Co., 53 Ohio St. 431, 41 N. E. R. 689, 53 Am. St. R. 648; see also Western Union Telegraph Co. v. Henderson, 89 Ala. 510, 7 So. R. 419, 18 Am. St. R. 148. In many of the states the question has not as yet been passed upon with reference to telegraph companies.

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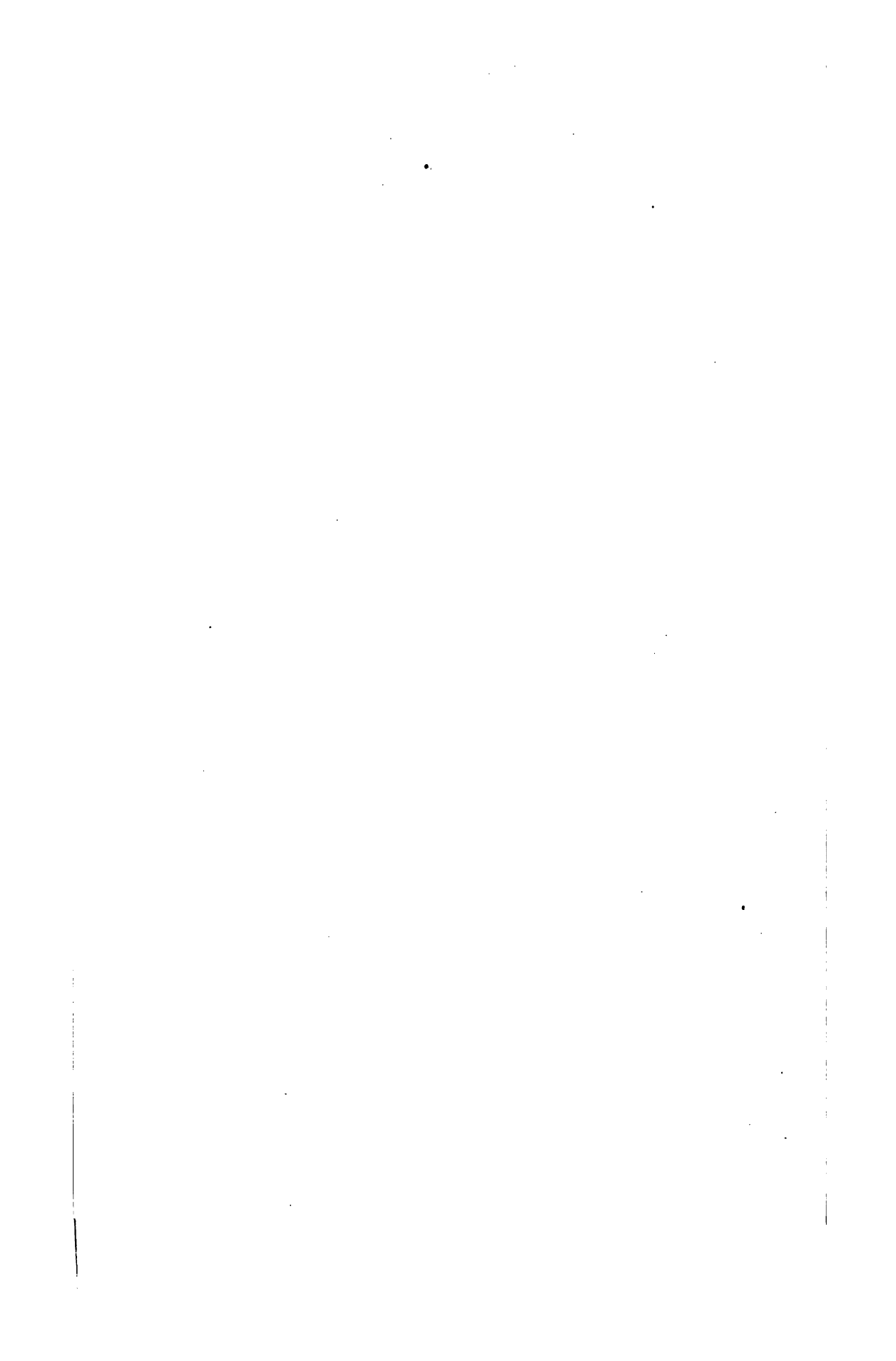
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